TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 178

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, APPELLANT,

vs.

JAMES W. DORSEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

FILED JUNE 12, 1964
PROBABLE JURISDICTION NOTED OCTOBER 12, 1964

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 26, 1964

[fol. 4] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 8756

JAMES W. DORSEY, DAN I. MACINTYRE, III and JAMES EDWARD MANGET, Plaintiffs,

vs.

BEN W. FORTSON, JR., as Secretary of State of Georgia; EUGENE GUNBY, Ordinary of Fulton County; and KATHERINE E. MANN, Ordinary of DeKalb County, Defendants.

COMPLAINT—Filed January 24, 1964

James W. Dorsey, Dan I. MacIntyre, III and James Edward Manget name themselves as plaintiffs herein and show to the Court the following:

1.

The plaintiffs herein name as defendants Ben W. Fortson, Jr., Secretary of State, who is the election official for the State of Georgia; Eugene Gunby, Ordinary of Fulton County and Katherine E. Mann, Ordinary of DeKalb County, each of whom is the election official for the county named and each is responsible for the conduct of elections in his respective county.

2.

This Court has original jurisdiction of this action under the provisions of Section 1343 of Title 28 of the United States Code.

3.

This is a proper case for determination by a bench to be composed of three Judges, as set forth in Section 2281 et seq. of Title 28 of the United States Code, inasmuch as this action seeks to obtain an interlocutory and permanent [fol. 5] injunction to restrain the enforcement, operation and execution of a state statute and a constitutional provision of the State of Georgia, and seeks to restrain officers of the State of Georgia, including the Secretary of State of Georgia, from complying with the provisions of such statutes and constitutional provisions. This action is further brought in the nature of a civil action under Section 2201 and Section 2202 of Title 28 of the United States Code, by seeking relief by declaratory judgment.

4.

James W. Dorsey is a registered voter in the 40th Senatorial District, which is a part of Fulton County, Georgia.

5.

Dan I. MacIntyre, III is a member of the Senate of the State of Georgia, elected from the 40th Senatorial District, which is a part of Fulton County, Georgia, and is also a registered voter in said Senatorial District in Fulton County.

6.

The plaintiff, Dan I. MacIntyre, III, ran and was elected from said 40th Senatorial District of Georgia and intends to run for re-election from said district.

7.

The plaintiff, James Edward Manget, is a registered voter in the 42nd Senatorial District of DeKalb County, Georgia.

8.

On October 3, 1962, the State Legislature of the State of Georgia passed Senate Bill No. 1 of the Second Extraor-

dinary Session of the 1962 Legislature. (Acts, 1962, September-October, Extraordinary Session, Page 7 et seq.) Said Act provides, among other things, for reapportionment of the State Senate and provides for the composition and number of senatorial districts.

[fol. 6] 9.

Two districts each lie within the counties of Muscogee, Richmond, Bibb and Cobb. Three districts each lie within the counties of Chatham and DeKalb. Seven districts lie within Fulton County. All other senatorial districts are composed of one or more counties.

10.

Said Act provides in part in Section 9 that:

> "Each senator must be a resident of his own senatorial district and shall be elected by the voters of his own district, except that the senators from those senatorial districts consisting of less than one county shall be elected by all the voters of the county in which such senatorial district is located."

11.

So much of the above quoted paragraph as provides "except that the senators from those senatorial districts consisting of less than one county shall be elected by all the voters of the county in which such senatorial district is located" denies the voters of those districts equal protection of the laws in that it results in invidious discrimination against the citizens and voters of all counties with more than one senatorial district by requiring that their representatives in the senate be elected and voted on by citizens and voters of other senatorial districts, and is therein unconstitutional, invalid, null and void in that it contravenes Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides, in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 7] 12.

In the 1962 general elections, the senators from the senatorial districts lying within the counties of Fulton and DeKalb were elected on a district wide basis and votes were counted on a district wide basis; however, the senators from the districts lying within the counties of Cobb, Bibb, Richmond, Chatham and Muscogee were counted on a county wide basis.

13.

Pursuant to the enactment of the aforesaid Senate Bill No. 1, the Georgia Constitution was amended to read as follows:

"The Senate shall consist of fifty-four (54) members. The General Assembly shall have authority to create, rearrange and change senatorial districts and to provide for the election of senators from each senatorial district, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable." (Article III, Section 2, Paragraph 1, Constitution of the State of Georgia)

14.

The adoption of the amendment to the aforesaid article of the Georgia Constitution also provided for ratification of the statute enacted at the Extraordinary Session of the General Assembly of Georgia, which convened on September 27, 1962 and enacted the statute heretofore referred to as Senate Bill No. 1 of said Extraordinary Session, and said statute was ratified at the 1962 general election.

15.

The plaintiffs show that the essence of a representative government is the selection of the representative by those whom he represents. The representatives elected in the multi-district counties are not under Georgia Law elected by those whom they represent, in that each senator must be elected by the constituents of another senator's district, as well as his own.

[fol. 8] 16.

It is further shown that the electors in the multi-district counties do not have the opportunity of choosing their own individual representative, but must as a group choose a group of representatives.

Wherefore, petitioners respectfully pray that this Court take jurisdiction of this matter; that a special Three Judge Court be convened to hear and determine this matter under the provisions of 28 United States Code, Section 2281 et seq. and that the rights of the petitioners be declared in accordance with Title 28, United States Code, Section 2201 on the following matters:

(1) That this Court hold and decree that so much of Section 9 of Senate Bill No. 1 of the Extraordinary Session of the Georgia Legislature convened in 1962 which says that ". . . except that the Senators from those senatorial districts consisting of less than one county shall be elected by all the voters of the county in which such senatorial district is located" be declared illegal, void and unconstitutional in that it deprives voters of the aforesaid counties and others similarly situated of liberty and property without due process of law and denies to the plaintiffs and others so similarly situated equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

(2) That this Court hold and decree the aforementioned amendment to the Constitution of the State of Georgia, Article III, Section 2, Paragraph 1, ratified by the electorate of the State of Georgia on the 6th day of November, 1962 and declared by the Governor of the State of Georgia

on the 16th day of November, 1962, to the extent that it [fol. 9] has been construed to authorize said Senate Bill No. 1, or is so applied, unconstitutional since said amendment to the Georgia Constitution is contrary to the Fourteenth Amendment of the Constitution of the United States;

(3) That this Court hold and decree that voters in the aforenamed counties and those similarly situated are entitled to choose senators on the basis of district wide voting rather than on the basis of county wide voting;

(4) That this Court restrain the defendants from furnishing any forms for election of senators based on a method of election on a county wide basis in a multi-district county rather than on a district wide basis in such multi-district county;

Plaintiffs pray for such other and further relief as to this Court seem just, proper and equitable in this cause.

Ed Barham, P. O. Box 587, Valdosta, Georgia;

Charles A. Moye, Jr., C & S National Bank Bldg., Atlanta 3, Georgia;

William C. O'Kelley, 1501 Bank of Georgia Bldg., Atlanta 3, Georgia;

Edwin F. Hunt, Bank of Georgia Building, Atlanta 3, Georgia.

[fol. 10] *Duly sworn to by James W. Dorsey, Dan I. MacIntyre, III and James E. Manget, jurats omitted in printing.*

[fol. 12] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

ORDER DESIGNATING THREE-JUDGE COURT—February 1, 1964

The Honorable Frank A. Hooper, United States District Judge for the Northern District of Georgia, to whom an application for injunction and other relief has been presented in the above-styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, I, Elbert P. Tuttle, Chief Judge of the Fifth Circuit, hereby designate the Honorable Griffin B. Bell, United States Circuit Judge, and the Honorable Lewis R. Morgan, United States District Judge for the Northern District of Georgia, to serve with Judge Hooper as members of, and with him to constitute the said court to hear and determine the action.

Witness my hand this 1st day of February, 1964.

Elbert P. Tuttle, Chief Judge, Fifth Circuit.

[fol. 14] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 15] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

ANSWER AND DEFENSE—Filed February 18, 1964

Now Comes Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, a Defendant in the above styled cause, and files this his Answer and Defense to the Complaint of the Plaintiffs hereinbefore filed, and shows:

First Defense

The Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense

The Complaint fails to join indispensable parties.

Third Defense

This Defendant answers the several Paragraphs of the Complaint as follows:

1.

Answering Paragraph 1 of the Complaint, this Defendant says that his duties as a public official are defined by law, of which this Court can take judicial notice.

2.

This Defendant denies the allegations contained in Paragraphs 2 and 3 of the Complaint.

[fol. 16] 3.

This Defendant admits the allegations contained in Paragraphs 4 and 5 of the Complaint.

4.

This Defendant admits the allegation contained in Paragraph 6 of the Complaint that "The plaintiff, Dan I. MacIntyre, III, ran and was elected from said 40th Senatorial District of Georgia". Further answering such Paragraph 6, this Defendant says that, for want of sufficient information to form a belief, he is unable either to admit or deny the allegation that Plaintiff MacIntyre "intends to run for re-election from said district".

5.

This Defendant admits the allegations contained in Paragraph 7 of the Complaint.

6.

This Defendant admits the allegations contained in Paragraph 8 of the Complaint, except that this Defendant says that Senate Bill No. 1 became law upon the approval of the Governor on October 5, 1962.

7.

This Defendant admits the allegations contained in Paragraphs 9 and 10 of the Complaint.

8.

This Defendant denies the allegations contained in Paragraph 11 of the Complaint.

9.

This Defendant admits the allegations contained in Paragraphs 12, 13 and 14 of the Complaint.

10.

This Defendant admits the allegation contained in Paragraph 15 of the Complaint that "The plaintiffs show that [fol. 17] the essence of a representative government is the selection of the representative by those whom he repre-

sents". This Defendant denies the remaining allegations contained in such Paragraph.

11.

Paragraph 16 of the Complaint states merely a legal conclusion and requires no answer.

12.

Except as herein expressly admitted, this Defendant denies each and every allegation of the Complaint.

Wherefore, this Defendant prays that the prayers of the Complaint be denied and that the Complaint be dismissed.

Eugene Cook, The Attorney General, Paul Rodgers, Assistant Attorney General, P. O. Address: 132 Judicial Building, 40 Capitol Square, Atlanta, Georgia, 30303, JAckson 5-0401, Counsel for This Defendant.

February 18, 1964.

[fol. 18] *Duly sworn to by Ben W. Fortson, Jr., jurat omitted in printing.*

Certificate of Service (omitted in printing).

[fol. 39]

In the United States District Court

For the Northern District of Georgia

Atlanta Division

[Title omitted]

Motion for Summary Judgment of the Defendant Ben W. Fortson, Jr., as Secretary of State of the State of Georgia—Filed March 6, 1964

Now Comes Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, a Defendant in the above styled cause, and moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judg-

ment dismissing the action on the ground that the pleadings together with the affidavits attached hereto show that there is no genuine issue between the Plaintiffs and Defendants as to any material fact in this action and that the Defendants are entitled to judgment in their favor as a matter of law.

Wherefore, this Defendant prays that this Motion be sustained and that the Complaint be dismissed.

Eugene Cook, The Attorney General, Paul Rodgers, Assistant Attorney General, P. O. Address: 132 Judicial Buildjng, 40 Capitol Square, Atlanta, Georgia, 30303, JAckson 5-0401, Counsel for This Defendant.

March 6, 1964.

[fol. 40]

EXHIBIT A TO MOTION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

CIVIL ACTION NO. 8756

[Title omitted]

AFFIDAVIT SUPPORTING MOTION FOR SUMMARY JUDGMENT

I, BEN W. FORTSON, JR., being first duly sworn, do depose and say that:

1.

I am a Defendant in the above entitled action.

2.

I am the duly elected and acting Secretary of State of the State of Georgia and have continuously served in such office since February 25, 1946.

3.

I, as Secretary of State, am the official custodian of the election returns for Amendments to the Constitution of the State of Georgia and of the file of Proclamations of the Governor proclaiming the Resolutions as being a part of the Constitution of the State of Georgia.

4.

The three pages of photographed matter hereto attached contain a true and correct copy of the consolidated vote [fol. 41] cast for and against the ratification of the sixteen proposed general Amendments to the Constitution of the State of Georgia in the General Election held on November 6, 1962, and the Proclamation of the Governor, dated November 16, 1962, proclaiming the results of the voting upon the said proposed Constitutional Amendments.

5.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records in a judicial proceeding.

/s/ BEN W. FORTSON, JR.
BEN W. FORTSON, JR.

Sworn to and subscribed
before me this 5th day
of March 1964.

/s/ JEAN K. RICHARDS
NOTARY PUBLIC, State of Georgia

Notary Public, Georgia State at Large
My Commission Expires March 3, 1965

(SEAL)

[fol. 42] ATTACHMENT TO EXHIBIT A

A PROCLAMATION

BY THE GOVERNOR:

WHEREAS: Pursuant to the provisions contained in the proposed Amendments to the Constitution of the State of Georgia, an Executive Proclamation was issued and published as provided in said Acts and as required by the Constitution of this State, submitting the following proposed Amendments for ratification or rejection by the qualified voters of the State at the General Election held Tuesday, November 6, 1962, and the following are the votes received:

		FOR	AGAINST
1.	Amendment to the Constitution so as to preserve inviolate freedom from compulsory association at all levels of public education and to require the General Assembly to provide funds for an adequate education for the citizens of Georgia.	125,684	82,250
1A.	Amendment to the Constitution so as to provide for the composition of the State Senate, the manner of election of State Senators, the ratification of the apportionment of the Senate and the election of Senators.	119,502	75,598
2.	Amendment to the Constitution so as to authorize the General Assembly to provide for the payment of grants to counties under certain conditions.	106,878	84,371
3.	Amendment to the Constitution so as to provide for improved appropriations control and to promote economy and efficiency in budget matters.	131,825	59,765

		For	Against
4.	Amendment to the Constitution so as to create the Department of Industry and Trade and to provide for a Board of Commissioners for said Department.	116,644	75,700
5.	Amendment to the Constitution so as to provide that certain compensation of peace officers shall be deemed to be a subsistence allowance.	71,788	125,035
6.	Amendment to the Constitution so as to furnish the people's elected representatives in the General Assembly sufficient time to study matters relating to the expenditure of public funds.	129,558	61,982
7.	Amendment to the Constitution so as to allow any county or municipality in this State to borrow the necessary funds to defray the cost of property valuation and equalization programs for ad valorem tax purposes.	108,418	82,084
8.	Amendment to the Constitution so as to provide for repayment of medical loans and scholarships by service at any prison or detention camp or work camp operated under the jurisdiction of the State Board of Corrections.	118,005	72,502

[fol. 43]

		For	Against
9.	Amendment to the Constitution of the State of Georgia, authorizing the General Assembly to delegate to counties the right to levy taxes for public transportation, and declaring the same to be an essential governmental function.	86,809	106,294
10.	Amendment to the Constitution so as to disqualify write-in candidates unless they have given notice of candidacy ten (10) days prior to election, and to authorize the General Assembly to enact other regulations.	81,935	113,763
11.	Amendment to the Constitution so as to increase and change the provisions relating to the payment authorized for bringing in the first commercial oil well.	87,777	98,796
12.	Amendment to Article VII, Section VII, Paragraph V of the Constitution of the State of Georgia, as amended, authorizing any county, municipal corporation or political subdivision of the State to issue and sell revenue bonds and to refund any such bonds to provide funds for the purpose of carrying out slum clearance and redevelopment work and to pledge certain taxes for that purpose.	92,124	99,138
13.	Amendment to the Constitution so as to extend the power of taxation over the whole State exercised by the General Assembly to include a tax for school lunch purposes.	93,756	103,813

		For	Against
14.	Amendment to the Constitution so as to allow counties to undertake and carry out a slum clearance and redevelopment program.	123,923	68,866
15.	Amendment to the Constitution so as to provide for the General Assembly enacting legislation over the Governor's veto.	119,084	71,405

THEREFORE: I, S. Ernest Vandiver, Governor of the State of Georgia, do hereby proclaim that general Amendments Nos. 1, 1A, 2, 3, 4, 6, 7, 8, 14, 15, having been ratified according to the Constitution of this State according to the results of the General Election, certified to me by the Secretary of State, are hereby declared to be a part of the Constitution of the State of Georgia, effective this date.

Amendments Nos. 5, 9, 10, 11, 12, 13, not having been ratified are hereby declared not to be a part of the Constitution of Georgia, effective this date.

[fol. 44]

Given under my hand and the Great Seal of the State of Georgia, in the City of Atlanta, this the 16th day of November, 1962, and of the Independence of the United States of America, the One Hundred and Eighty-Seventh.

/s/ S. ERNEST VANDIVER
Governor

BY THE GOVERNOR:

/s/ CHARLES T. WHITE
Secretary,
Executive Department

/s/ BEN W. FORTSON, JR.
Secretary of State

[fol. 45]

EXHIBIT B TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CIVIL ACTION NO. 8756

[Title omitted]

AFFIDAVIT SUPPORTING MOTION FOR SUMMARY JUDGMENT

I, BEN W. FORTSON, JR., being first duly sworn, do depose and say that:

1.

I am a Defendant in the above entitled action.

2.

I am the duly elected and acting Secretary of State of the State of Georgia and have continuously served in such office since February 25, 1946.

3.

I, as Secretary of State, am the official custodian of the election returns for Amendments to the Constitution of the State of Georgia.

4.

The one-page photographed matter hereto attached contains a true and correct copy of the vote of the electors of each county in the General Election held on November [fol. 46] 6, 1962, for and against the ratification of the proposed Amendment to the Constitution of the State of Georgia so as to provide for the composition of the State Senate, the manner of election of State Senators, the ratification of the apportionment of the Senate and the election of the Senators.

5.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records in a judicial proceeding.

/s/ BEN W. FORTSON, JR.
BEN W. FORTSON, JR.

Sworn to and subscribed
before me this 5th day
of March 1964.

/s/ JEAN K. RICHARDS
NOTARY PUBLIC, State of Georgia

Notary Public, Georgia State at Large
My Commission Expires March 3, 1965

(SEAL)

[fol. 47] ATTACHMENT TO EXHIBIT B

COUNTY	No. 1A FOR	No. 1A AGAINST	COUNTY	No. 1A FOR	No. 1A AGAINST
Appling	178	15	Crisp	409	231
Atkinson	62	6	Dade	99	58
Bacon	56	33	Dawson	70	46
Baker	52	91	Decatur	326	218
Baldwin	601	307	DeKalb	14,292	7,835
Banks	41	75	Dodge	430	593
Barrow	305	192	Dooly	251	170
Bartow	846	661	Dougherty	2,057	1,034
Ben Hill	434	149	Douglas	420	257
Berrien	188	114	Early	235	133
Bibb	3,817	4,688	Echols	20	7
Bleckley	309	257	Effingham	156	132
Brantley	86	54	Elbert	593	426
Brooks	485	375	Emanuel	390	276
Bryan	75	23	Evans	77	31
Bulloch	355	187	Fannin	123	86
Burke	266	155	Fayette	412	262
Butts	257	81	Floyd	3,421	2,444
Calhoun	169	23	Forsyth	151	97
Camden	427	241	Franklin	459	228
Candler	50	12	Fulton	20,133	14,931
Carroll	748	577	Gilmer	209	756
Catoosa	400	167	Glascock	39	22
Charlton	43	18	Glynn	1,859	650
Chatham	7,302	5,304	Gordon	307	371
Chatta-hoochee	42	37	Grady	432	276
Chattooga	492	208	Greene	375	199
Cherokee	589	357	Gwinnett	1,291	700
Clarke	1,728	1,248	Habersham	665	415
Clay	41	16	Hall	1,730	1,288
Clayton	1,776	820	Hancock	104	138
Clinch	60	40	Haralson	338	162
Cobb	5,651	2,646	Harris	244	142
Coffee	473	225	Hart	195	76
Colquitt	692	436	Heard	125	144
Columbia	445	142	Henry	652	349
Cook	137	119	Houston	1,929	1,000
Coweta	613	256	Irwin	136	110
Crawford	109	92	Jackson	449	232
			Jasper	157	113

County	No. 1A For	No. 1A Against	County	No. 1A For	No. 1A Against
Jeff Davis	87	34	Randolph	97	91
Jefferson	318	195	Richmond	3,201	1,884
Jenkins	193	86	Rockdale	365	212
Johnson	70	81	Schley	90	46
Jones	237	171	Screven	215	216
Lamar	224	184	Seminole	221	43
Lanier	37	3	Spalding	1,094	430
Laurens	471	382	Stephens	511	124
Lee	67	34	Stewart	207	133
Liberty	183	251	Sumter	804	500
Lincoln	106	61	Talbot	141	82
Long	17	9	Taliaferro	49	63
Lowndes	767	236	Tattnall	181	174
Lumpkin	170	91	Taylor	144	122
Macon	249	234	Telfair	408	183
Madison	165	73	Terrell	283	160
Marion	84	36	Thomas	1,853	844
McDuffie	452	186	Tift	497	156
McIntosh	102	90	Toombs	197	162
Meriwether	333	166	Towns	65	24
Miller	143	44	Treutlen	114	59
Mitchell	399	149	Troup	859	351
Monroe	535	212	Turner	214	103
Montgomery	50	109	Twiggs	93	85
Morgan	244	95	Union	114	325
Murray	188	127	Upson	522	223
Muscogee	3,930	2,232	Walker	935	509
Newton	1,046	510	Walton	447	225
Oconee	211	90	Ware	1,624	558
Oglethorpe	136	92	Warren	148	65
Paulding	216	136	Washington	569	295
Peach	371	322	Wayne	502	323
Pickens	153	119	Webster	100	67
Pierce	258	104	Wheeler	171	317
Pike	107	40	White	334	150
Polk	1,001	378	Whitfield	971	581
Pulaski	191	145	Wilcox	182	96
Putnam	315	101	Wilkes	372	242
Quitman	77	47	Wilkinson	148	137
Rabun	191	83	Worth	206	219
			Totals	119,502	75,598

[fol. 48]

EXHIBIT C TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CIVIL ACTION NO. 8756

[Title omitted]

AFFIDAVIT SUPPORTING MOTION FOR SUMMARY JUDGMENT

I, GLENN W. ELLARD, being first duly sworn, do depose and say that:

1.

I am the duly elected and acting Clerk of the House of Representatives of the General Assembly of the State of Georgia and have continuously served in such office since January 12, 1959.

2.

I, as the Clerk to the House of Representatives, am the official custodian on this date of all bills and resolutions, including amendments and substitutes thereto, introduced in or passed by the House of Representatives during the 1963 and 1964 Regular Sessions of the General Assembly.

3.

An Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct. 1962, Extra. Sess., pp. 7-31), provides in part that "the Senators [fol. 49] from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located.".

4.

I have made a diligent search of the legislative records on file in the office of the Clerk of the House of Representatives and I fail to find any bill or resolution, including any amendment or substitute thereto, to repeal or otherwise alter the statutory requirement quoted in Paragraph 3 of this Affidavit.

5.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records and my search thereof in a judicial proceeding.

/s/ GLENN W. ELLARD
GLENN W. ELLARD

Sworn to and subscribed
before me this 5th day
of March 1964.

/s/ AMELIA SMITH
NOTARY PUBLIC, State of Georgia

My commission expires Oct. 19, 1964.

(SEAL)

[fol. 50]

EXHIBIT D TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CIVIL ACTION NO. 8756

[Title omitted]

AFFIDAVIT SUPPORTING MOTION FOR SUMMARY JUDGMENT

I, ANN DUNCAN, being first duly sworn, do depose and say that:

1.

I am the duly appointed and acting Calendar Clerk of the Senate of the General Assembly of the State of Georgia and have continuously served in such office since January 12, 1948.

2.

I, as the Calendar Clerk of the Senate, am an official custodian on this date of all bills and resolutions, including amendments and substitutes thereto, introduced in or passed by the Senate during the 1963 and 1964 Regular Sessions of the General Assembly.

3.

An Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct. 1962, Extra. [fol. 51] Sess., pp. 7-31) provides in part that "the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located."

4.

I have made a diligent search of the legislative records on file in the office of the Secretary of the Senate and I fail to find any bill or resolution, including any amendment or substitute thereto, to repeal or otherwise alter the statutory requirement quoted in Paragraph 3 of this Affidavit.

5.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records and my search thereof in a judicial proceeding.

Ann Duncan

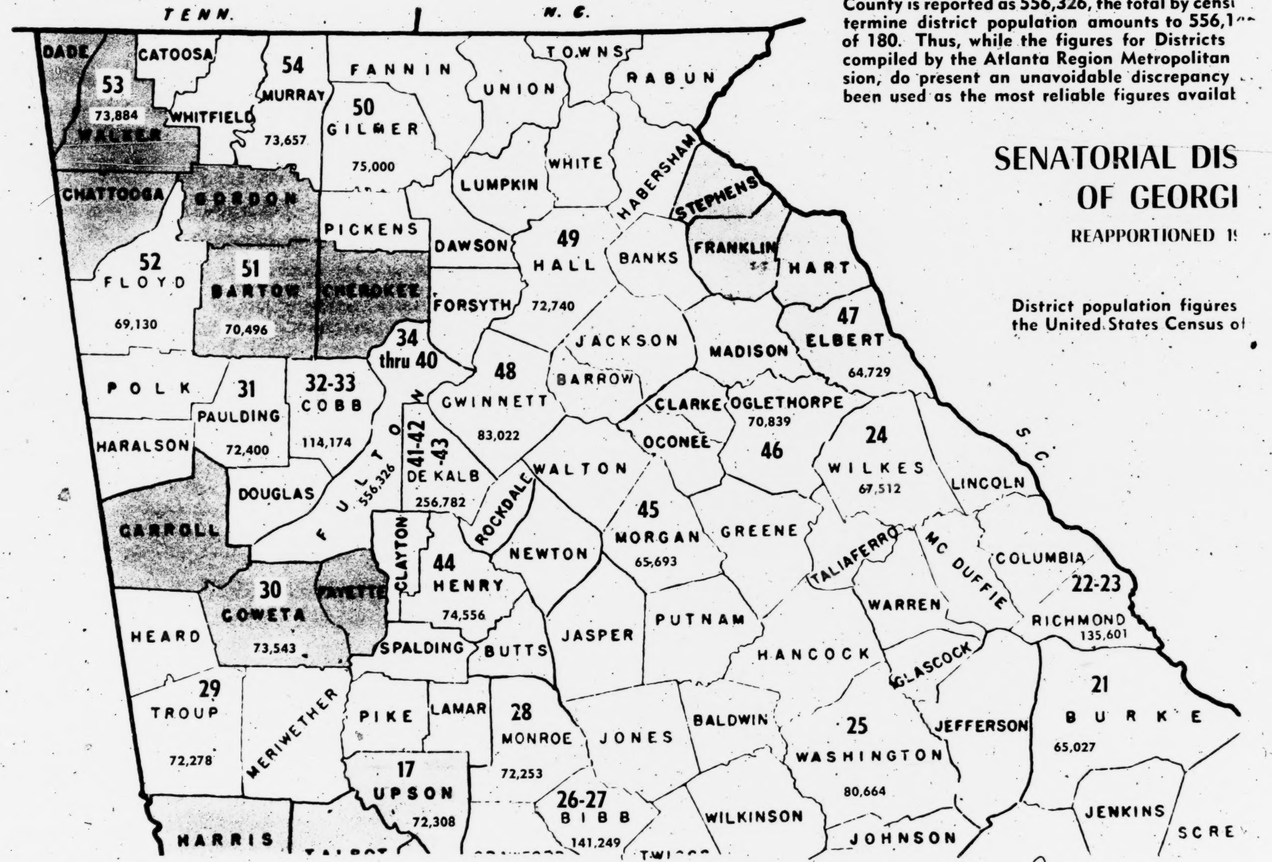
/s/ Ann Duncan
Ann Duncan

Sworn to and subscribed
before me this 6th day
of March 1964.

/s/ Amelia Smith
Notary Public, State of Georgia

My commission expires Oct. 19, 1964.

(Seal)



Detail does not add to total. While the total pc
County is reported as 556,326, the total by censu
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of 180. Thus, while the figures for Districts
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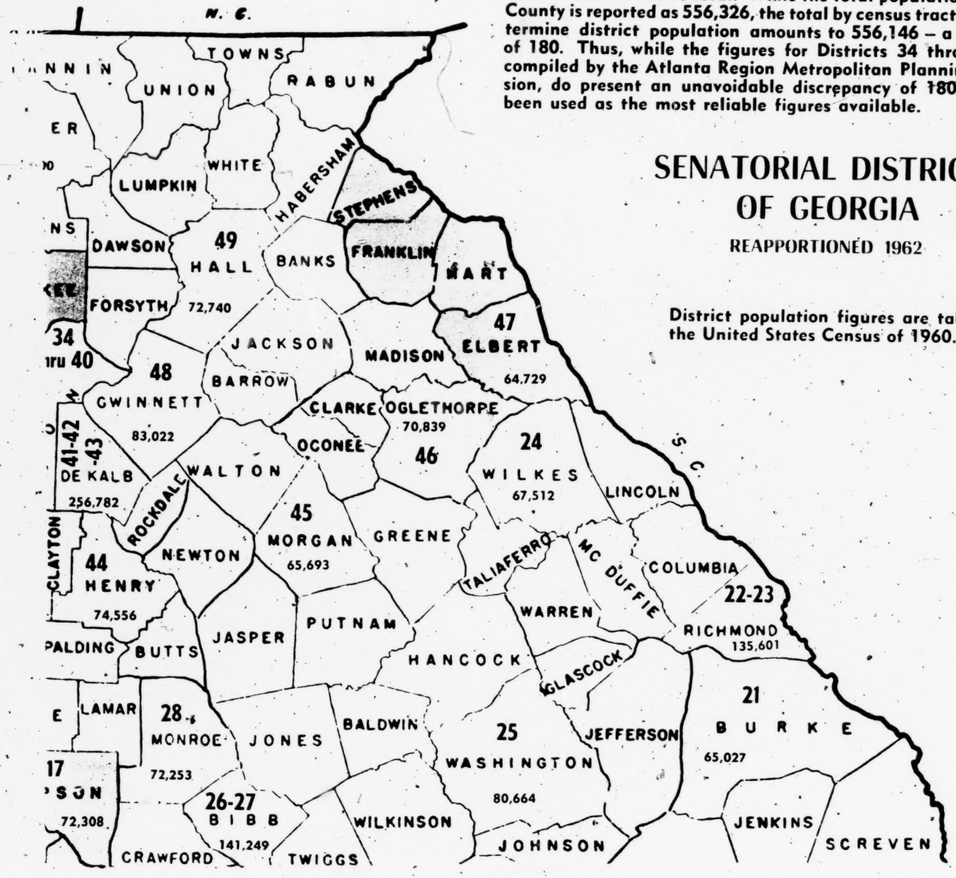
SENATORIAL DIS OF GEORGI

REAPPORTIONED 1

District population figures
the United States Census o



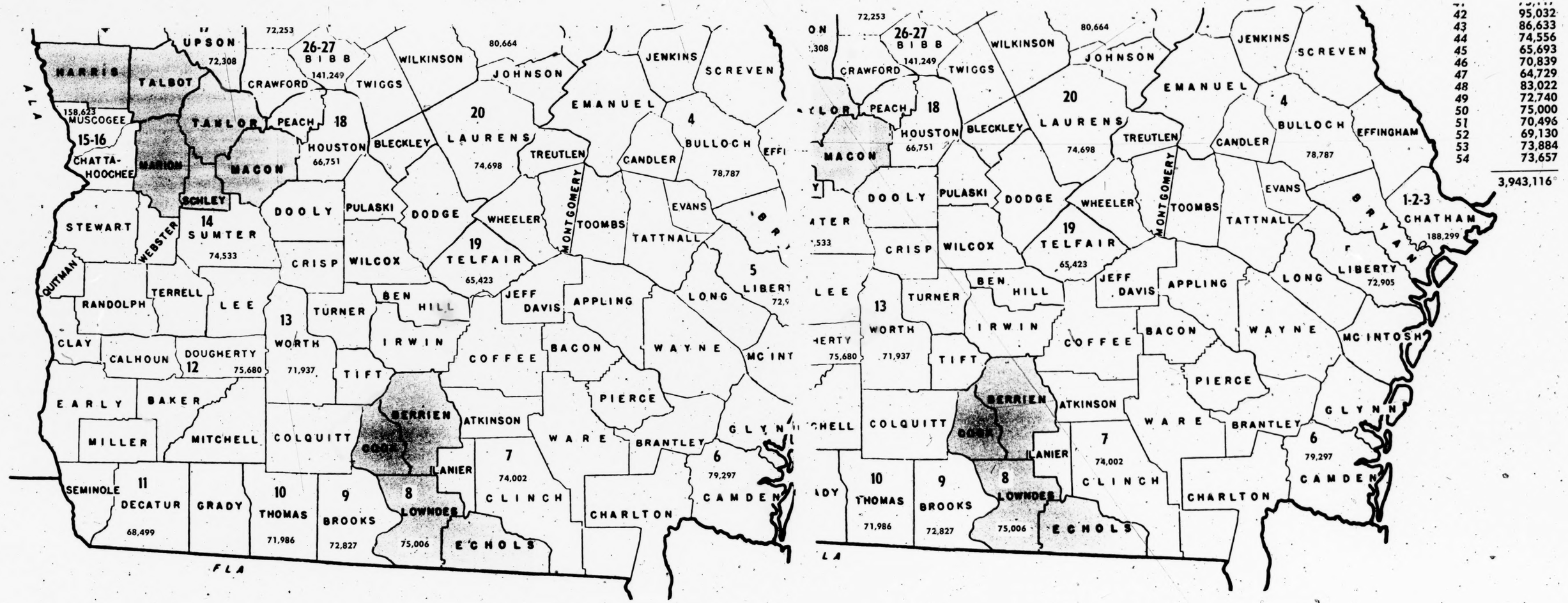
Detail does not add to total. While the total population for Fulton County is reported as 556,326, the total by census tracts used to determine district population amounts to 556,146 – a discrepancy of 180. Thus, while the figures for Districts 34 through 40, as compiled by the Atlanta Region Metropolitan Planning Commission, do present an unavoidable discrepancy of 180, they have been used as the most reliable figures available.

SENATORIAL DISTRICTS OF GEORGIA

REAPPORTIONED 1962

District population figures are taken from the United States Census of 1960.

POPULATION BY DISTRICTS	
1	61,668
2	60,696
3	65,935
4	78,787
5	72,905
6	79,297
7	74,002
8	75,006
9	72,827
10	71,986
11	68,499
12	75,680
13	71,937
14	74,533
15	79,285
16	79,338
17	72,308
18	66,751
19	65,423
20	74,698
21	65,027
22	70,626
23	64,975
24	67,512
25	80,664
26	69,449
27	71,800
28	72,253
29	72,278
30	73,543
31	72,400
32	61,602
33	52,572
34	82,195
35	82,888
36	79,023
37	78,540
38	78,953
39	79,713
40	74,834
41	75,117
42	95,032
43	86,633
44	74,556
45	65,693


72,253
UPSON
72,308
26-27
BIBB
141,249
WILKINSON
80,664
JOHNSON
JENKINS
SCREVEN
HARRIS
TALBOT
CRAWFORD
TWIGGS
EMANUEL
158,623
MUSCOGEE
TAYLOR
PEACH
18
20
4
15-16
HOUSTON
66,751
BLECKLEY
LAURENS
74,698
TREUTLEN
CANDLER
BULLOCH
78,787
EFFI
CHATTA-
HOOCHEE
MARION
MACON
SCHLEY
MONTGOMERY
TOOMBS
EVANS
STEWART
WEBSTER
14
SUMTER
74,533
DOOLY
PULASKI
DODGE
WHEELER
19
TELFAIR
65,423
TATTNALL
1-2-3
CHATHAM
188,299
QUITMAN
CRISP
WILCOX
5
LIBERT
72,9
RANDOLPH
TERRELL
LEE
BEN HILL
JEFF DAVIS
APPLING
LONG
13
TURNER
CLAY
CALHOUN
DOUGHERTY
12
75,680
WORTH
71,937
IRWIN
COFFEE
BACON
WAYNE
MC INT
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EARLY
BAKER
PIERCE
BERRIEN
COOK
ATKINSON
WARE
BRANTLEY
GLYNN
MILLER
MITCHELL
COLQUITT
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7
74,002
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CLINCH
CAMDEN
SEMINOLE
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DECATUR
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GRADY
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THOMAS
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BROOKS
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LOWNDES
75,006
CHARLTON
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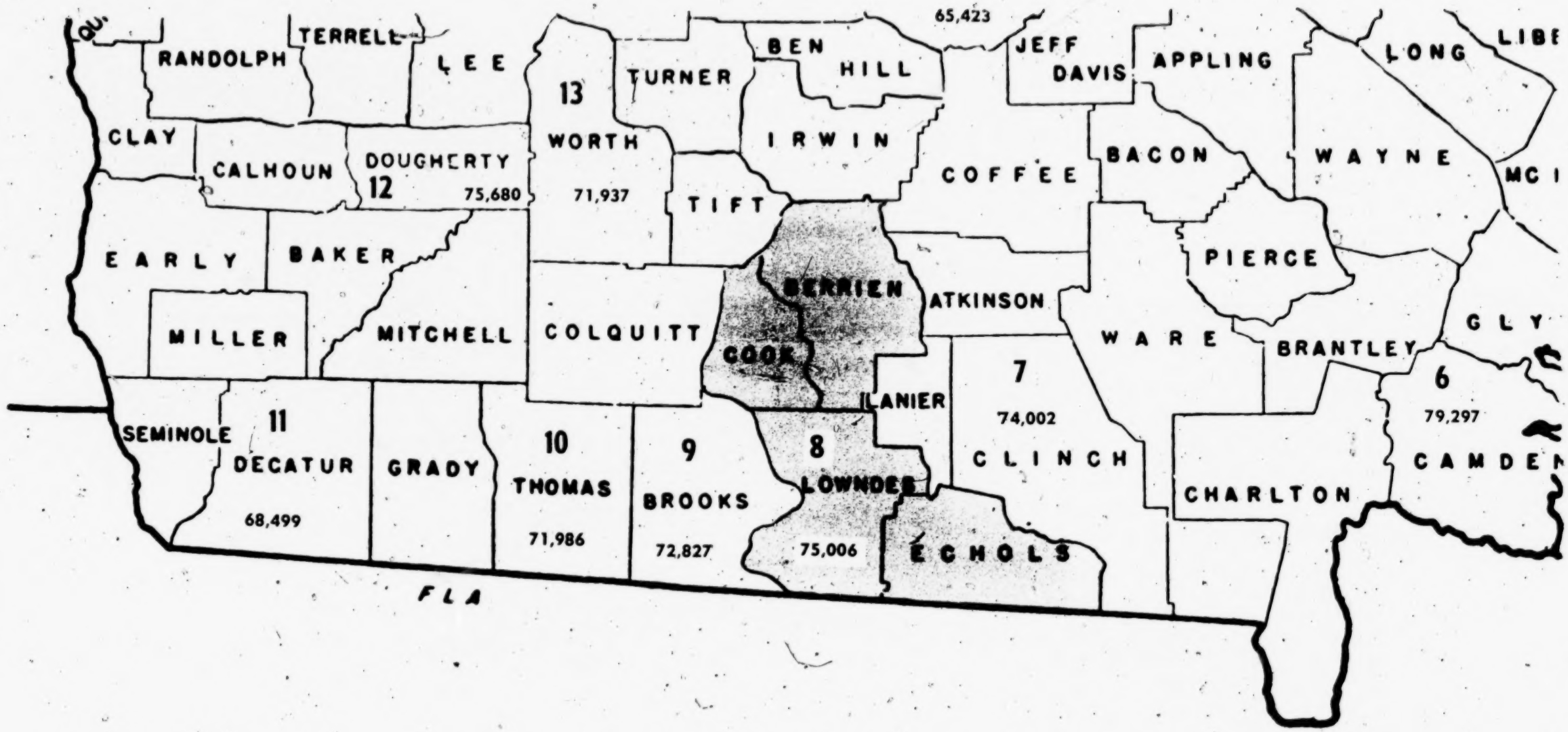
42 95,032
43 86,633
44 74,556
45 65,693
46 70,839
47 64,729
48 83,022
49 72,740
50 75,000
51 70,496
52 69,130
53 73,884
54 73,657
3,943,116



District	Counties
1-2-3	Chatham
4	Screven, Effingham, Bulloch, Candler, Evans and Tattnall
5	Bryan, Liberty, Long, McIntosh and Glynn
6	Jeff Davis, Appling, Bacon, Wayne, Pierce, Brantley, Charlton and Camden
7	Atkinson, Clinch, Coffee, Lanier and Ware
8	Berrien, Cook, Echols and Lowndes
9	Brooks, Colquitt and Tift
10	Grady, Mitchell and Thomas

District	Counties
11	Baker, Calhoun, Clay, Decatur, Early, Miller and Seminole
12	Dougherty
13	Ben Hill, Crisp, Irwin, Lee, Turner and Worth
14	Chattahoochee, Randolph, Stewart, Sumter, Terrell, Webster and Quitman
15-16	Muscogee
17	Harris, Mac[illegible]on, Schley, Talbot, Tayl[illegible] Upson
18	Crawford, Twiggs, Houston and Peach

District	Counties
19	Bleckley, Dodge, Pulaski, Telfair, Dooly and Wilcox
20	Johnson, Laurens, Treutlen, Wheeler, Montgomery and Toombs
21	Emanuel, Jenkins, Burke and Jefferson
22-23	Richmond
24	Wilkes, Lincoln, Columbia, McDuffie, Glascock, Warren, Taliaferro and Greene
25	Hancock, Baldwin, Washington, Wilkinson and Jones
26-27	Bibb

District	Counties
28	Butts, Lamar, Monroe, Pike and Spalding
29	Heard, Meriwether and Tr[illegible]
30	Carroll, Coweta and Fayett[illegible]
31	Douglas, Haralson, Pauldin[illegible] and Polk
32-33	Cobb
34 thru 40	Fulton
41-42-43	DeKalb
44	Clayton, Henry and Rockdo[illegible]
45	Putnam, Jaspe[illegible], Morgan, Newton and Walton
46	Oconee, Clarke, Madison and Oglethorpe

District	Counties
1	Baker, Calhoun, Clay, Decatur, Early, Miller and Seminole
2	Dougherty
3	Ben Hill, Crisp, Irwin, Lee, Turner and Worth
4	Chattahoochee, Randolph, Stewart, Sumter, Terrell, Webster and Quitman
16	Muscogee
7	Harris, Macon, Marion, Schley, Talbot, Taylor and Upson
8	Crawford, Twiggs, Houston and Peach
19	Bleckley, Dodge, Pulaski, Telfair, Dooly and Wilcox
20	Johnson, Laurens, Treutlen, Wheeler, Mohtgomery and Toombs
21	Emanuel, Jenkins, Burke and Jefferson
22-23	Richmond
24	Wilkes, Lincoln, Columbia, McDuffie, Glascock, Warren, Taliaferro and Greene
25	Hancock, Baldwin, Washington, Wilkinson and Jones
26-27	Bibb
28	Butts, Lamar, Monroe, Pike and Spalding
29	Heard, Meriwether and Troup
30	Carroll, Coweta and Fayette
31	Douglas, Haralson, Paulding and Polk
32-33	Cobb
34 thru 40	Fulton
41-42-43	DeKalb
44	Clayton, Henry and Rockdale
45	Putnam, Jasper, Morgan, Newton and Walton
46	Oconee, Clarke, Madison and Oglethorpe
47	Stephens, Franklin, Hart and Elbert
48	Banks, Jackson, Barrow and Gwinnett
49	Dawson, Forsyth, Hall and Lumpkin
50	Fannin, Gilmer, Habersham, Pickens, Rabun, Towns, Union and White
51	Bartow, Cherokee and Gordon
52	Floyd
53	Chattooga, Dade and Walker
54	Catoosa, Murray and Whitfield

[fol. 88] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CIVIL ACTION NO. 8756

[Title omitted]

MOTION FOR SUMMARY JUDGMENT BY THE PLAINTIFFS—
Filed March 13, 1964

Now comes the plaintiffs in the above styled case, and, through their attorneys, move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter a summary judgment against the defendants on the ground that pleadings, together with the affidavits filed with the Motion for Summary Judgment of the defendant Ben W. Fortson, Jr., show that the plaintiffs are entitled to a judgment in their favor as a matter of law.

Wherefore, the plaintiffs pray that this motion be sustained and that judgment be entered for the plaintiffs against the defendants herein.

William C. O'Kelley, Of Counsel for the Plaintiffs,
1501 Bank of Georgia Building, Atlanta, Georgia
30303, 522-1188.

[fol. 89]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

REFERENCE TO AFFIDAVITS AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS—Filed March 13, 1964

The plaintiffs hereby incorporate in support of its motion for summary judgment all of the affidavits filed with the motion for summary judgment of the defendant, Ben W. Fortson, Jr., and the verified petition. Plaintiffs refer to, without the necessity of repeating herewith, their brief of authorities filed with the Clerk of this Court on March 2, 1964 as an authority for the motion for summary judgment.

The Court asked that the defendant's motion for summary judgment, the plaintiffs' motion for summary judgment and the briefs thereon all be considered at the same time, on March 17, 1964, and that this case be disposed of as involving only questions of law, there being no issues of fact to be decided by the Court.

Respectfully submitted,

William C. O'Kelley, Of Counsel for the Plaintiffs, 1501 Bank of Georgia Building, Atlanta, Georgia 30303, 522-1188.

[fol. 90] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Number 8756

[Title omitted]

Transcript of Proceedings—Filed April 21, 1964

Atlanta, Georgia; March 17, 1964

Before:

Circuit Judge Griffin Bell, District Judge Frank A. Hooper, and District Judge Lewis R. Morgan.

APPEARANCES:

For the Plaintiffs: Mr. Charles A. Moye, Jr., Mr. William C. O'Kelley.

For the Defendants: Mr. Paul Rodgers, Mr. George P. Dillard, Mr. John T. Ferguson.

[fol. 91] Judge Bell: All right, gentlemen, we will call the case of Dorsey, et al., versus Fortson, et al.

Mr. Moye: Ready for the plaintiffs, Your Honors.

Mr. Rodgers: Ready for the Secretary of State, Your Honors.

Mr. Ferguson: Ready for Eugene Gunby.

Judge Bell: What about Mrs. Mann? Is Mr. Dillard in the courtroom? Any of the counsel heard from Mr. Dillard? Here he is right here.

Let me be sure we have got everybody represented. Mr. Moye, you representing all of the plaintiffs?

Mr. Moye: Together with Mr. O'Kelley and Mr. Hunt, we represent all the plaintiffs.

Judge Bell: All right, sir. Mr. Dillard is representing Mrs. Mann, Ordinary of DeKalb County?

Mr. Dillard: Yes, sir.

Judge Bell: Mr. Rodgers is representing the Secretary of State, Mr. Fortson?

Mr. Rodgers: Yes, sir.

Judge Bell: And Mr. Ferguson is representing Eugene Gunby, the Ordinary of Fulton County?

Mr. Ferguson: Yes, sir.

Judge Bell: All right. Now, I think it would be well to have some agreement about the time you think you need to argue your respective positions. We won't hold you strictly to the time, but we'd like to have an estimate.

[fol. 92] Mr. Moye, we will hear from you.

Mr. Moye: Your Honors, may I raise the question at this time. I assume as plaintiffs we have the burden of showing—we have the burden of going forward and sustaining our case. The Defendant Fortson has filed a motion for summary judgment. I guess generally the movants have the burden of going forward. Two have not.

Judge Bell: Mr. Rodgers can argue that. He is responding to your opening argument.

Mr. Moye: In order to place the case in perspective, we also, although it did not comply with the ten-day rule of the local rules, also filed a motion for summary judgment, because we believe that the matters before the Court can be decided as a matter of law on that basis; I believe that an hour to an hour and fifteen minutes would be sufficient for our side, say, thirty to forty-five minutes in opening and fifteen minutes to a half hour for closing, if that is satisfactory with the Court.

Judge Bell: We will just put it down for an hour and not hold you strictly to it.

Mr. Moye: Very good.

Judge Bell: Who is going to make the first argument for the defendants?

Mr. Ferguson: Your Honors, as far as argument is concerned, I believe we have expressed our position in the [fol. 93] brief; we are willing to abide by the Court's decision, whatever it may be, and we have attempted to call some cases to the Court's attention, but we are leaving it to the Court.

Judge Bell: All right.

Mr. Rodgers: Your Honor, we can keep our arguments within an hour, also.

Judge Bell: All right, sir. Now, the next question, does anybody propose to put anything into evidence like the election returns in the last election?

Mr. Moye: Your Honors, those are attached as exhibits to the motion for summary judgment of the Secretary of State, and we believe that they should be considered by the Court, and they are incorporated by reference in our motion for summary judgment.

Judge Bell: Now, does that include the county-wide returns as well as the district-wide returns? You remember during the last election, because of some court order, I don't know whose order it was, I have forgotten now, whether it was our order or the Superior Court's order, the election returns were counted on the basis of a county-wide tabulation and a district-wide tabulation. You recall that.

Judge Hooper: Judge Pye's order.

Judge Bell: Is that in evidence?

Mr. Rodgers: No, sir.

Judge Bell: It's not attached to it as an exhibit?

[fol. 94] Mr. Rodgers: No, sir; we did not feel it was necessary to bring in that material in affidavit form.

Judge Bell: I know you wouldn't put it in; I can well understand why you wouldn't put it in, because it is against your position. But I was wondering why the other side didn't put it in.

Mr. Rodgers: Well, since that time, Your Honor, there has been a constitutional amendment to the Georgia Constitution. Of course, those returns could have a bearing, but, of course, exhibits attached to our motion for summary judgment were designed to show the adoption of that constitutional amendment, the counties that it carried in throughout the State, and also two affidavits directly showing there's been no effort made in the General Assembly to change the statutory requirement.

Judge Bell: I know that. Let's don't argue the case right at this point. Mr. Moye, any way you can put those in so the Court will have the benefit of them, seems to me they go directly to the question of whether this present system affords representative government. In other words, if they show a candidate from one District, received less

than the majority in the District but won the county-wide race, it would be very pertinent to the issue before the Court, I think.

Mr. Moye: Well, Your Honor, under those circumstances [fol. 95] we would ask leave for ten to fifteen days in order to get those canvasses and make them a part of the record by affidavit. It was going to be our position that the possible discrimination is one as a matter of law and one which the Court can take judicial notice of. However, we would now request that we be given fifteen days following this hearing in which to secure those returns and to put them in as an exhibit to our motion for summary judgment.

Judge Bell: Couldn't you put them in in, say, three days?

Mr. Moye: Certainly make the effort, Your Honor. I don't know the difficulties that are going to attend the securing of them.

Judge Bell: Mr. Rodgers can make them available.

Mr. Rodgers: Your Honor, if it would help the Court, we will try to get the Secretary of State's office, I'm sure they have the information, to prepare this in affidavit form. We will try to get it filed late this afternoon.

Judge Bell: All right.

Mr. Rodgers: Out of an abundance of precaution we would like to offer our affidavits into evidence at this time which are attached to our motion for summary judgment. Also, we will try to get into court either this afternoon or tomorrow the information you have requested.

Judge Bell: All right.

Mr. Rodgers: Do you want that just for Fulton County? [fol. 96] Judge Bell: No; any county.

Mr. Rodgers: In other words, you want it for all seven counties?

Judge Bell: As I recall, Chatham, out of an abundance of caution, counted their votes both ways.

Mr. Rodgers: That's right.

Judge Bell: DeKalb County, I think, counted theirs both ways.

Mr. Rodgers: In some counties the Senators won both ways, so, consequently, it didn't make any difference.

Judge Bell: Well, it would help your side. We want to get some facts before us. The difficulty about a 3-Judge

statutory District Court is you usually don't have sufficient facts to make a ruling on, and it is difficult to have a trial on the facts where you have three judges, but I think in this case it is an important case and warrants having sufficient facts before the Court on which to make an intelligent ruling. If you will do that, Mr. Rodgers, that would be very helpful to the Court.

Mr. Rodgers: All right.

Judge Bell: All right, Mr. Moye, you may proceed.

(Whereupon oral argument was made on behalf of the Plaintiffs by Mr. Moye.)

(Whereupon oral argument was made on behalf of the Defendants by Mr. Rodgers and Mr. Dillard.)

[fol. 97] (Whereupon oral argument was made on behalf of the Plaintiffs by Mr. O'Kelley, during which the following occurred:)

Mr. O'Kelley: I think Your Honor's question inferred, and I certainly agree that this is not necessary, certainly in light of the Wesberry case and in light of the Toombs case, for in the Toombs case the Court said that in Georgia, as in the case of Tennessee, there is no provision in the State Constitution for initiative or referendum instituted by the people to bring about a change in the Constitution and Laws of the State. To argue, as do the defendants here, that the plaintiffs should be limited to the State Legislature to seek the redress which they claim is their constitutional right would be to expect them to succeed in having them in a dominating position in the State Legislature.

Judge Bell: That doesn't follow here at all.

Mr. O'Kelley: We, we submit—

Judge Bell: I have no doubt this statute would be changed in the Legislature if semebody would get over there and make some effort to do it. But the question is, can we go ahead and require, are we under a duty to require it, even though nobody sought it in the Legislature?

Mr. O'Kelley: I think the Court—

Judge Bell: I would have not thought so, and I wrote [fol. 98] an opinion in this Savannah Beach case to the contrary, until Wesberry versus Sanders, but apparently

that hasn't got a thing in the world to do with it now, the fact you can get relief in the Legislature. Apparently Congress could have done this; they have done it for fifty years on re-districting; the Legislature could do it. The Supreme Court didn't allude to that at all, didn't give any weight to that. It just said it was up to the Court to do it.

As I see it, the whole concept of these cases was changed by Wesberry versus Sanders. We held in Toombs versus Fortson what you just referred to; it was a strangle-hold like you had in Tennessee, you couldn't get relief.

Mr. O'Kelley: Because of the extreme disparity.

Judge Bell: You can get relief here; at least, you can try.

(Whereupon argument continued by counsel for Plaintiffs and Defendants, the following occurring after the close of all arguments:)

Mr. O'Kelley: If we understand the agreement prior to argument, we will submit affidavits as to the county-wide versus district-wide election results to the Court today?

Mr. Rodgers: That's right.

Judge Morgan: That's right.

Judge Bell: And all of you are putting your affidavits into evidence without objection, as I understand?

[fol. 99] Mr. Rodgers: Yes, sir; that's right. It's not in affidavit form but we'd like to put in this map of the State of Georgia which shows the per-district population.

Mr. O'Kelley: We have no objection to the map.

Judge Bell: We'd like to have that.

Mr. O'Kelley: And we consider the verified petition as the affidavit of the plaintiffs.

Judge Bell: You have got somewhere in here the number of people in each senatorial district, haven't you?

Mr. O'Kelley: It's on the map.

Mr. Rodgers: It is on the map itself.

Mr. O'Kelley: It is on the map, and we have no objection.

Mr. Rodgers: In other words, we'd like to offer that map into evidence.

Judge Bell: Well, without taking the time to number all these things, every affidavit—

Mr. Rodgers: That's right.

Judge Bell: —attach it to the pleadings.

Mr. Rodgers: It's every affidavit plus that map attached to the motion for summary judgment. There were four affidavits and that map.

Judge Bell: All right. Now, all yours are attached to the motion for summary judgment?

Mr. O'Kelley: No, sir—yes, sir, Your Honor, our motion for summary judgment referred to the affidavit filed [fol. 100] by the Secretary of State. We accept their affidavits.

Judge Bell: I see; you didn't have any evidence, actually?

Mr. O'Kelley: We have the petition filed by us, which is verified, and we submit the individual verifications in each of the parties and basically all of these facts I think are admitted, even though they were not originally in the answer I think they were ultimately admitted in the briefs.

Judge Bell: All of these things are before the Court now except the canvass of the returns in the last senatorial election which will be furnished this afternoon.

Mr. Rodgers: If we can.

Judge Bell: Now, you may not be able to get all of them.

Mr. Rodgers: That's what I'm saying. You want those clearly for Fulton and DeKalb. The plaintiffs have alleged—

Judge Bell: My question is that the Secretary of State may not have these figures.

Mr. Rodgers: That's right. I'll give you everything the Secretary has on those seven counties.

Judge Bell: All right. And if you can't get them from him, we would like to have them from somewhere else.

Mr. O'Kelley: If we can't get them there I will work with Mr. Rodgers on getting them. I will advise Your Honors by telephone, if I may, and we will endeavor to obtain them from the Secretary of State.

[fol. 101] Judge Morgan: Can't you get them from the Ordinary in Fulton County?

Mr. O'Kelley: This would be my next choice if we can't get them from the Secretary of State.

Judge Bell: Mr. Dillard, you will cooperate?

Mr. Dillard: Yes, sir.

Judge Bell: And Mr. Ferguson?

Mr. Ferguson: Yes, Your Honor.

Judge Bell: You will cooperate to help get them from the Ordinary if you can't get them from the Secretary of State?

Any other matter to come before the Court? Court will stand adjourned under the usual order.

[fol. 102] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 118] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

CIVIL ACTION NO. 8756

[Title omitted]

AFFIDAVIT—Filed March 19, 1964

I, Ben W. Fortson, Jr., being first duly sworn, do depose and say that:

1.

I am a Defendant in the above entitled Action.

2.

I am the duly elected and acting Secretary of State of the State of Georgia and have continuously served in such office since February 25, 1946.

3.

I, as Secretary of State, am an official custodian of election returns and other records showing the number of votes cast for candidates seeking the office of State Senator in

the General Election held in the State of Georgia on November 6, 1962, and the Special Election held in Chatham County, Georgia, on February 13, 1963.

4.

Election returns on file in my office show that each person named below was a candidate in the General Election [fol. 119] held on November 6, 1962, for the office of State Senator identified by the Senatorial District indicated, and received in such Election the number of votes stated opposite his name:

Bibb County, Georgia

Twenty-Sixth Senatorial District

William J. Hunt	8,254	(county-wide)
James O. Jackson	4,253	(county-wide)
William J. Hunt	4,074	(dist.-wide)
James O. Jackson	2,741	(dist.-wide)

Twenty-Seventh Senatorial District

J. Taylor Phillips	8,997	(count.-wide)
J. Taylor Phillips	6,748	(dist.-wide)

Chatham County, Georgia

First Senatorial District

Frank O. Downing	15,736

Second Senatorial District

William A. Searcey	15,822

Third Senatorial District

Harris Slotin	11,741
Joseph J. Tribble	11,455

Cobb County, Georgia

Thirty-Second Senatorial District

Edward Kendrick	8,609

Thirty-Third Senatorial District

Kyle Yancey	8,609

DeKalb County, Georgia

Forty-First Senatorial District

H. (Mac) McKinley Conway, Jr.	5,546
Earl J. Roberts	3,479

Forty-Second Senatorial District

Ben F. Johnson	9,755
Robert L. (Bob) Fine	5,072

Forty-Third Senatorial District

W. Hugh McWhorter	6,017

Fulton County, Georgia

Thirty-Fourth Senatorial District

Charlie Brown	8,191

[fol. 120]

Frank Coggin	4,988

Thirty-Sixth Senatorial District

Joe Salome	4,181

Thirty-Seventh Senatorial District

George C. Lundquist	2,685
James P. Wasberry, Jr.	6,586

Thirty-Eighth Senatorial District

T. M. Alexander	3,368
LeRoy R. Johnson	7,637

Thirty-Ninth Senatorial District

Oby T. Brewer, Sr.	5,264
Rod Harris	2,662

Fortieth Senatorial District

Hamilton Lokey	8,300
Dan MacIntyre	8,957

Muscogee County, Georgia

Fifteenth Senatorial District

A. Perry Gordy	4,630
William C. (Billy) Wickham	4,608

Sixteenth Senatorial District

Harry Jackson	6,370

Richmond County, Georgia

Twenty-Second Senatorial District

J. B. Fuqua	8,400

Twenty-Third Senatorial District

Milford A. Scott	7,785

5.

Election records on file in my office show that a contest was filed concerning the vote shown in Paragraph 4 above for the candidates seeking the office of State Senator identified with the Third Senatorial District, that such contest resulted in the holding of a Special Election on February 13, 1963, and that in such Election each candidate named [fol. 121] below received the number of votes stated opposite his name:

Joseph J. Tribble	14,127
Eugene H. Gadsden	8,096
Spence M. Grayson	6,628
John H. Baker, Jr.	4,441

6.

The Ordinary for Bibb County, Georgia, is the only election official that filed in my office information showing the number of votes cast for senatorial candidates on a district-wide and county-wide basis in the General Election held on November 6, 1962. A comparison of the votes received by the senatorial candidates running in each of the other six Counties named in Paragraph 4 above with the general

county-wide aggregate vote cast in each of these Counties, respectively, indicates that the senatorial candidates in Chatham, Cobb, Muscogee and Richmond Counties ran county-wide, and that the senatorial candidates in DeKalb and Fulton Counties ran district-wide.

7.

I do not have on file in my office any returns of primaries conducted by political parties for the nomination of party candidates to seek any of the senatorial offices in the seven Counties referred to in Paragraph 4 above in the General Election held on November 6, 1962, or the Special Election held on February 13, 1963.

8.

This Affidavit is submitted pursuant to the direction given by the Court in the above entitled Action on March 17, 1964.

9.

The facts stated by me in this Affidavit are made on my personal knowledge of official records on file in my office which would be admissible in evidence and I am competent to testify as to the authenticity of such records in a judicial proceeding.

[fol. 122] Ben W. Fortson, Jr.

Sworn to and subscribed before me this 19th day of March 1964.

Jean K. Richards, Notary Public, State of Georgia.

Notary Public, Georgia State at Large. My Commission Expires March 3, 1965.

(Seal)

[fol. 123] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 137] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 8756

JAMES W. DORSEY, DAN F. MACINTYRE, III and JAMES EDWARD MANGET, Plaintiffs,

v.

BEN W. FORTSON, JR., as Secretary of State of Georgia; EUGENE GUNBY, Ordinary of Fulton County; and KATHERINE E. MANN, Ordinary of DeKalb County, Defendants.

Before BELL, Circuit Judge, and HOOPER and MORGAN, District Judges.

OPINION—March 27, 1964

PER CURIAM:

Plaintiffs, respectively, a registered voter from the 40th Senatorial District of Georgia, located in Fulton County; the State Senator who is also a registered voter from the same district; and a registered voter from the 42nd Senatorial District of Georgia, located in DeKalb County, seek relief, both declaratory and injunctive, from the force of the Georgia statute which requires countywide voting in the selection of state senators in counties having plural senatorial districts. Ga. Laws, Extraordinary Session, September-October, 1962, p. 7 et seq., § 9. The defendants are the election officials, respectively, for the State of Georgia, Fulton and DeKalb Counties.

The complaint is premised on a claim of violation of rights afforded under the equal protection clause of the [fol. 138] Fourteenth Amendment. This rests on alleged discriminatory treatment of plaintiffs in the debasement of

their right to vote for a senator from their own district in that they must join with voters from other districts in the selection process, while voters residing in counties forming, either in whole or part, single senatorial districts are accorded the right to select their senators on a districtwide basis. They assert, for themselves and those in the same class, that the statutory effect is to place the selection of the senator from any district in a plural district county in the hands of voters other than those residing in the district.

The constitutionality of a state statute being involved in the context of a substantial question, a Three-Judge District Court was convened pursuant to 28 USCA, § 2281. *Gray* v. *Sanders*, 1963, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821. At the outset we hold that the court has jurisdiction, plaintiffs have standing to sue, and that a justiciable issue is presented. 28 USCA, §§ 1343(3), 2201, and 2202; *Baker* v. *Carr*, 1962, 369 U.S. 186, 82 S.Ct. 601, 7 L.Ed.2d 663; *Gray* v. *Sanders*, supra; *Wesberry* v. *Sanders*, United States Supreme Court, No. 22, Oct. Term, 1963, decided Feb. 17, 1964; and *Toombs* v. *Fortson*, N.D. Ga., 1962, 205 F.Supp. 248.

Plaintiffs as well as defendant Fortson have filed motions for summary judgment and we proceed to a consideration of the merits of those motions. While no findings of fact are necessary in the determination of such motions, *Hindes* v. *United States*, 5 Cir., 1964, 326 F.2d 150, there is no dispute as to the facts, and they may be briefly stated as follows. We begin with the decision of this court in *Toombs* v. *Fortson*, supra, holding the General Assembly of Georgia to be malapportioned, and requiring that either the Senate or House of Representatives be apportioned on the basis of population so as to meet minimal constitutional standards of legislative apportionment.

[fol. 139] The General Assembly thereafter convened and reapportioned the Senate on the basis of population. The then existing fifty four senatorial districts were reconstituted with the result that they ranged in population from 52,572 to 95,032. Some districts were located together with others in one county; others were made up of one whole county; while the remainder were comprised of two or

more counties. For example, seven senatorial districts were located in Fulton County, three each in DeKalb and Chatham Counties, and two in each of the Counties of Bibb, Cobb, Muscogee and Richmond. The 12th Senatorial District is composed of Dougherty County alone, while the 52nd is composed only of Floyd County. The remainder may be described as plural county districts. The remaining districts are composed of from two to seven counties.

The apportionment of the House of Representatives was not changed. Its apportionment, as the court noted in *Toombs* v. *Fortson*, is based largely on geography, with representatives from the one hundred and three less populous counties of the state making a constitutional majority of the two hundred and five members of the House. At the same time, they represent only twenty two and one half percent of the population of the state. It was also noted that the eight most populous counties, although containing forty one percent of the population of the state, elect only twenty four of the two hundred and five representatives, or a little less than twelve percent of the total number. Each county has at least one representative while no county can have more than three.

The statute reapportioning the Senate, supra, in § 9 thereof, provides as follows:

> [Vol. 140] "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all voters of the county in which such Senatorial District is located."

It was the intent of the General Assembly as expressed in § 12 of this statute that the Senate be apportioned on population and the House on geography. At the same extraordinary session an amendment to the Constitution was proposed to provide that the Senate should consist of fifty four members and that the General Assembly should have authority to create, rearrange and change senatorial districts and to provide for the election of senators from each senatorial district or from several districts embraced

within one county. This proposal was adopted by the people of Georgia in the general election of 1962, and by the people of all counties having plural districts save Bibb.

It is that portion of the quoted provision relating to elections in districts consisting of less than one county that plaintiffs seek to have declared unconstitutional as conflicting with the equal protection clause of the Fourteenth Amendment.[1]

They buttress their contention of invidious discrimination on the proposition that the essence of representative [fol. 141] government is the selection of the representative by those whom he represents, citing *Toombs* v. *Fortson*, supra. They state that the representatives elected in the plural district counties are not elected by those whom they represent since voters so situated do not have the opportunity of choosing their own senator, but must join with others to choose a group of senators. They assert, without contradiction, on the basis of the population of the various districts in Fulton County that only eighteen percent of the voters in the other six districts of that county could nullify the unanimous choice of the voters in the 34th Senatorial District and thrust a representative upon voters of that district for whom no one at all within the district had voted. Of course, this is carried to an extreme but it cannot be disputed that the selection of a senator from these districts is not within the control and province of the voters of the separate districts. By way of contrast, this is not the case with voters residing in districts not situated in plural district counties.

The Secretary of State urges that countywide voting is a rational and permissive classification in the interest

[1] Shortly after the enactment of this statute, and prior to the special election of senators under it, litigation ensued in the state court with respect to its constitutionality under the state constitution. That suit, which affected only those senatorial districts lying within the counties of Fulton and DeKalb, resulted in a decree requiring that the elections be held on a districtwide basis only, and this was the case. However, the senators from the districts lying within the other counties having plural districts were elected on a countywide basis. This was prior to the amendment to the state constitution.

of county government.[1] He points to the fact that plaintiffs have a political remedy and have not availed themselves of it even though one of the plaintiffs is a member of the State Senate. It is argued that there has been no dilution or debasement of the votes of plaintiffs since the whole of the fractional parts, i.e., their being able to vote for more than one senator, is equal to the vote of one residing in a district where he votes for one senator only.

[fol. 142] We hold that the complaint is meritorious. There is no genuine issue as to any material fact and it appears that plaintiffs are entitled to judgment as a matter of law. Accordingly, the motion of plaintiffs for summary judgment will be granted, and that of the defendant Secretary of State denied.

The statute causes a clear difference in the treatment accorded voters in each of the two classes of senatorial districts. It is the same law applied differently to different persons. The voters select their own senator in one class of districts. In the other they do not. They must join with others in selecting a group of senators and their own choice of a senator may be nullified by what voters in other districts of the group desire. This difference is a discrimination as between voters in the two classes. The question is whether the discrimination reaches the point of being invidious for that is the type of discrimination that is proscribed by the Fourteenth Amendment. The Supreme Court in *Gray* v. *Sanders*, supra, in discussing the Georgia County Unit System where the state was divided into election units varying in population, with the result that voters, as between units, were treated differently to the extent that the votes of some were diluted, pointed out that the system violated the equal protection clause of the Fourteenth Amendment and said:

> " * * * there is no indication in the Constitution that homesite * * * affords a permissible basis for distinguishing between qualified voters within the State."

---

[1] Defendants Gumby and Mann did not join in the motion for summary judgment. They appeared at the hearing on the motions, through counsel, and did not dispute the facts, nor did they contest the position of the Secretary of State and plaintiffs that the case was ripe for summary judgment.

We think the rationale of that case is applicable here by analogy. The unit system applied in statewide races and brought about a dilution of votes on the basis of homesite through the use of units. Here the dilution or debase-[fol. 143] ment is of the right of some to choose their representative. It is discrimination in another form, but we think it necessarily follows that voters in some senatorial districts cannot be treated differently from voters in other senatorial districts. The statute here is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not. It is an invidious discrimination tested by any standard. Cf., tests laid down by this court in *Toombs* v. *Fortson*, *supra*, and *Sanders* v. *Gray*, N.D. Ga., 1962, 203 F.Supp. 158. We agree that the essence of representative government is the choosing of a representative by those he represents. See memorandum opinion in *Toombs* v. *Fortson*, unpublished, dated September 5, 1962. And this principle must be applied in an evenhanded manner. Its application may not be withheld from some while at the same time being afforded others, once a political system such as a division of the state into senatorial districts is adopted.

It is contended that the character of the discrimination can be justified on the basis that harmony between senators is required so that the county in which they reside may be better represented. This is said to be a reasonable classification. See *McGowan* v. *State of Maryland*, 1960, 366 U.S. 420, 51 S.Ct. 1101, 6 L.Ed.2d 393, on the subject of permissible classifications by states. The answer to this is that the Senate is to represent population and not geography. That was the intent of the General Assembly in reapportioning. Protecting the interest of counties may be a high motive but it cannot be done at the expense of the voters of the populous counties as is the case here.

[fol. 144] With respect to the fact that plaintiffs have not sought to use their available political remedy, our attention is called to the case of *Spahos* v. *Mayor and Councilmen of the Town of Savannah Beach*, S.D. Ga., 1962, 207 F.Supp. 688, affirmed, 1962, 371 U.S. 206, 83 S.Ct. 304, 9 L.Ed.2d 269. There the court in testing for invidiousness did determine

that plaintiffs had a political remedy available as distinguished from the stranglehold situation present in *Baker* v. *Carr*, supra, but there was another overriding consideration in dismissing the complaint. That was that the classification of voters being attacked was found to have a reasonable basis. This is not the case here. Moreover, the teaching of *Wesberry* v. *Sanders*, supra, decided thereafter by the Supreme Court, is that available political remedies, as was the case with both state and federal legislative remedies available, is not a bar or even a deterrent to an adjudication or declaration of constitutional rights. It may be the subject of consideration in the determination of the relief to be thereafter accorded, but not in the declaration of rights.

In sum, the Senate was apportioned to population. The state through the statute in question and the medium of constitutional amendment, divided the state into population districts. Having done so, and the circumstances as they relate to voters residing in each being the same; they are entitled to equal treatment. For these reasons, we hold that portion of the statute in question here, to-wit, the requirement "that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all voters of the county in which such Senatorial District is located" to be unconstitutional on the basis of being violative of the equal protection clause of the Fourteenth [fol. 145] Amendment. It is therefore null and void. This will leave that portion of the statute in force which provides that each senator shall be elected by the voters of the district of which he is a resident.

The injunctive relief sought is denied. There is no indication that defendants will not follow the law as declared. In fact, plaintiffs stated in open court that this was the case and that they believed injunctive relief to be unnecessary in the event the court voided the statute. These respected and responsible officials are simply caught up in the ferment of change stemming from the recent concept of applying federal constitutional standards to the political process through the use of the judicial process, *Baker* v. *Carr*, supra, and its progeny. We think that a declaration of

rights under the circumstances, with the attendant striking of the infected portion of the statute, will suffice.

Plaintiffs may submit an appropriate order after due notice to counsel for defendants.

This the 27 day of March, 1964.

Griffin B. Bell, United States Circuit Judge; Frank A. Hooper, United States District Judge; Lewis R. Morgan, United States District Judge.

[fol. 146] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 8756

JAMES W. DORSEY, DAN I. MACINTYRE, III and JAMES EDWARD MANGET, Plaintiffs,

v.

BEN W. FORTSON, JR., as Secretary of State of Georgia; EUGENE GUNBY, Ordinary of Fulton County; and KATHERINE E. MANN, Ordinary of DeKalb County, Defendants.

FINAL JUDGMENT OF THE COURT—Filed and Entered April 6, 1964

The above and foregoing matter having been heard by a Three Judge Court as an action for declaratory judgment and on motions for summary judgment filed by the plaintiffs and by the defendant, Ben W. Fortson, Jr., and the matter properly being before the Court in accordance with Rules 56 and 57 of the Rules of Civil Procedure, and the Court having entered an opinion dated March 27, 1964 in favor of the plaintiffs, Now Therefore

It Is Hereby Ordered, Adjudged, Decreed and Declared that so much of the statute here under consideration, to wit:

that part of Section 9 of the Georgia Laws, Extraordinary Session, September-October, 1962, at page 7 et seq. that provides "except that the senators from those senatorial districts consisting of less than one county shall be elected by all voters of the county in which such senatorial district is located" is unconstitutional, unenforceable, null and void, as being in violation of the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States.

It Is Further Ordered and Adjudged that the Motion for Summary Judgment of the defendant, Fortson, is overruled and that the Motion for Summary Judgment of the plaintiffs is granted.

[fol. 147] It Is Further Ordered and Declared that each and every senator to the State Legislature for the State of Georgia shall be elected by the voters of his own district, without regard to whether said senatorial district comprises an entire county or more than one county, or less than one county.

This 6th day of April, 1964.

Griffin B. Bell, Judge, United States Circuit Court, Sitting as Senior Judge of a Three Judge Court for the Northern District of Georgia; Frank A. Hooper, Judge, United States District Court; Lewis R. Morgan, Judge, United States District Court.

[fol. 149] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 8756

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 14, 1964

I.

Notice is hereby given that Ben W. Fortson, Jr., as the Secretary of State of the State of Georgia, a Defendant above named, hereby appeals to the Supreme Court of the United States from the order and final judgment granting the Plaintiffs' motion for summary judgment, entered in this action on March 27, 1964, and April 6, 1964, respectively.

This appeal is taken pursuant to 28 U. S. C., Sections 1253 and 2101(b).

II.

The Clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk of the Supreme Court of the United States.

III.

The following questions are presented by this appeal:

(A) Whether a state legislature, containing fifty-four senators, may divide a state into fifty-four senatorial districts according to population, some districts containing [fol. 150] one or more counties and some counties containing two or more districts, and require that the senators from the districts containing one or more counties be elected by the voters within their respective districts, while also

requiring that the senators from the multi-district counties be elected by the voters within their respective counties;

(B) Whether that part of Section 9 of an Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides that "the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located", denies to the Plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

Eugene Cook, The Attorney General, Paul Rodgers, Assistant Attorney General, Counsel for the Defendant, Ben W. Fortson, Jr., as the Secretary of State of the State of Georgia.

April 14, 1964

[fol. 151] Proof of Service (omitted in printing).

[fol. 152] [File endorsement omitted]

In the United States District Court

For the Northern District of Georgia

Atlanta Division

Civil Action No. 8756

[Title omitted]

Motion for Stay Pending Appeal—Filed April 14, 1964

Now Comes Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, a Defendant in the above styled cause, and moves the Court for an order staying the effectiveness of the order and final judgment entered in favor of the Plaintiffs herein on March 27, 1964, and April 6, 1964, respectively, pending appeal to the Supreme Court of

the United States and until the determination thereof, and as ground therefor says:

1.

On January 24, 1964, the Plaintiffs filed their complaint herein seeking declaratory and injunctive relief against the enforcement of the State statutory provision requiring the county-at-large election of State senators from multi-senatorial district counties, which was alleged to be violative of the guarantees of the Fourteenth Amendment to the Constitution of the United States.

2.

On March 6, 1964, and March 13, 1964, motions for summary judgment were filed by this Defendant and the Plaintiffs, respectively.

[fol. 153]

3.

On March 27, 1964, and April 6, 1964, the Court entered an order and final judgment, respectively, granting the motion for summary judgment of the Plaintiffs and denying the motion for summary judgment of this Defendant.

4.

On April 14, 1964, this Defendant filed in the Court a notice of appeal from such order and final judgment to the Supreme Court of the United States and, out of an abundance of precaution, also filed a notice of appeal from such order and final judgment to the United States Court of Appeals for the Fifth Circuit.

5.

This Defendant is moving with all possible diligence in order to have the appeal docketed in the Supreme Court of the United States within the next fourteen days, and the Defendant intends to file a motion to advance so that such appeal may be heard and determined prior to the adjournment of the term.

6.

Such appeal involves difficult and novel questions of law in an area of constitutional development in which standards have not yet been formulated by the Supreme Court of the United States and, furthermore, the appeal concerns the method of electing State senators which is of fundamental importance in the government of the people of Georgia. In view of these circumstances, there should be no disruption of the State's electoral process unless required by the Supreme Court.

7.

Unless, pending this Defendant's appeal to the Supreme Court of the United States, such order and final judgment of this Court is stayed, irreparable harm will result to the State of Georgia and its citizens should such order and judgment be reversed on appeal.

[fol. 154] Wherefore, this Defendant moves the Court to stay the effectiveness of the order and final judgment entered in this action pending the disposition of this Defendant's appeal herein, and for that purpose to fix the amount of the bond prescribed by Rule 62(d) of the Federal Rules of Civil Procedure if the Court deems such a bond to be necessary under the circumstances of this case.

Eugene Cook, The Attorney General, Paul Rodgers, Assistant Attorney General, Counsel for the Defendant, Ben W. Fortson, Jr., as the Secretary of State of the State of Georgia.

April 14, 1964

[fol. 155] Certificate of Service (omitted in printing).

[fol. 156] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

RESPONSE TO MOTION FOR STAY PENDING APPEAL
—Filed April 23, 1964

Comes now the plaintiffs in the captioned case and file this response to the motion of the defendant, Ben W. Fortson, Jr., for a stay pending his appeal from the judgment of this Court.

1.

The plaintiffs admit the allegations of paragraphs 1, 2, 3, and 4 of defendant's motion.

2.

The plaintiffs can neither admit nor deny the allegations of paragraph 5 of the defendant's motion.

3.

The plaintiffs deny the allegations of paragraphs 6 and 7 of the defendant's motion.

4.

To stay the judgment of this Court in the above case pending appeal of the defendant would deny the plaintiffs, and others similarly situated to plaintiffs, of the protection of the United States Constitution in the forthcoming 1964 elections and would cause irreparable harm to the [fol. 157] voters of the multi-district counties of the State of Georgia.

5.

This Court has declared the Georgia statute in question unconstitutional to the extent set forth in petitioner's complaint and this Court should not now allow the officials of the State of Georgia a stay.

Wherefore, the plaintiffs request the Court to deny the defendant's motion for a stay of the effectiveness of its previously entered order and final judgment in this action.

William C. O'Kelley, Attorney for Plaintiffs.

[fol. 160] [File endorsement omitted]

In the United States District Court
For the Northern District of Georgia
Atlanta Division
Civil Action No. 8756

James W. Dorsey, Dan I. MacIntyre, III and James Edward Manget, Plaintiffs,

v.

Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, Eugene Gunby, as Ordinary of Fulton County, Georgia, and Katherine E. Mann, as Ordinary of DeKalb County, Georgia, Defendants.

Order on Motion for Stay Pending Appeal
—April 28, 1964

The motion of the Secretary of State of the State of Georgia, one of the defendants in the within matter, for stay pending appeal is Denied.

This 28th day of April, 1964.

Griffin B. Bell, United States Circuit Judge; Frank A. Hooper, United States District Judge; Lewis R. Morgan, United States District Judge.

[fol. 161] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 162]

SUPREME COURT OF THE UNITED STATES

No. 178, October Term, 1964

BEN W. FORTSON, JR., as Secretary of State of Georgia, Appellant,

vs.

JAMES W. DORSEY et al.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1964

Appeal from the United States District Court for the Northern District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

Number [redacted] 178

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,
Appellant,

vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

JURISDICTIONAL STATEMENT.

EUGENE COOK,
The Attorney General,
PAUL RODGERS,
Assistant Attorney General,
Counsel for the Appellant.

P. O. Address:
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Atlanta, Georgia, 30303,
JAckson 5-0401.

June 11, 1964.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

Cases Cited.

Statutes Cited.

Miscellaneous Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

Number .....

BEN W. EORTSON, JR., as Secretary of State of the State of Georgia,
Appellant,

vs,

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

JURISDICTIONAL STATEMENT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Appellant submits herewith his Jurisdictional Statement as required by Rules 13 and 15 of the Revised Rules of the Supreme Court of the United States.

OPINION BELOW.

The opinion and final judgment of the Three-Judge District Court (R. 137-147) are unreported, and are reprinted in the appendix.

JURISDICTION.

This is a suit brought under 28 U. S. C. 1343 and 2201 by three registered voters of the Atlanta metropolitan area in the United States District Court for the Northern District of Georgia against the Secretary of State of Georgia and two local election officials seeking to invalidate, on Federal constitutional grounds, a State law requiring the county-at-large election of State senators in counties apportioned plural senatorial representation, and to enjoin the defendants from complying with the provisions of the challenged law. Jurisdiction of the suit is vested in the Three-Judge District Court by 28 U. S. C. 2281.

In an opinion rendered on March 27, 1964, and in final judgment rendered on April 6, 1964, the Three-Judge District Court granted the declaratory relief sought by the plaintiffs but denied the injunctive relief on the ground that there "is no indication that defendants will not follow the law as declared" (R. 145). On April 14, 1964, the notice of appeal to this Court from such opinion and judgment was filed with the Clerk of the District Court (R. 149).

The jurisdiction of this Court to review by direct appeal such opinion and final judgment is conferred by 28 U. S. C. 1253 and 2101 (b).

The following cases sustain the jurisdiction of this Court to review such opinion and judgment on direct appeal in this case: **Baker v. Carr** (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 691; **Gray v. Sanders** (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801; and **Wesberry v. Sanders** (1964), 376 U. S. 1, 11 L. ed. 2d 481.

This case presents a unique jurisdictional feature because the denial of injunctive relief in the District Court

was theoretically favorable to the Appellant who, nevertheless, seeks to directly appeal its judgment to this Court under a statute (28 U. S. C. 1253) apparently restricted to use by a party adversely affected by the grant or denial of injunctive relief. However, this appeal appears to be well within the purview of the statute because it is plain that the relief sought in the complaint demanded the convocation of the Three-Judge Court to hear and determine the case. Several decisions of the Court have mentioned this criterion in finding the requisite jurisdiction for direct appeal. See: **United States v. Georgia Public Service Commission** (1963), 371 U. S. 285, 287, 2d par., 9 L. ed. 2d 317, 320, l. col. 2d par., 83 S. Ct. 397; **Paul v. United States** (1963), 371 U. S. 245, 249, last par. 9 L. ed. 2d 292, 296, r. col., 3d par., 83 S. Ct. 426; **Florida Lime and Avocado Growers, Inc. v. Jacobsen** (1960), 362 U. S. 73, 85, 4 L. ed. 2d 568, 576, l. col., last par., 80 S. Ct. 568; **Stainback v. Mo Hock Ke Lok Po** (1949), 336 U. S. 368, 376, last par., 93 L. ed. 741, 748, l. col., 2d par., 69 S. Ct. 606; and **Rorick v. Board of Commissioners of Everglades Drainage District** (1939), 307 U. S. 208, 212, 2d par., 83 L. ed. 1242, 1244, l. col., last par., 59 S. Ct. 808.

Furthermore, it is clear that the plaintiffs received substantial redress of their grievance from the District Court and that the denial of the injunctive relief resulted solely from the willingness of the defendants to comply with any judgment entered, and because the District Court believed that the plaintiffs would be entitled to such relief if it became necessary to enforce the judgment. To deny a direct appeal under these circumstances would mean that a party, enjoined because of his intention of violating a declaratory decree, would be entitled to a speedy appeal to this Court, while, on the other hand, a party, not enjoined because of his willingness to comply with a declaratory decree, would be forced to travel through the Court

of Appeals in order to obtain the judgment of this Court. In other words, the good faith of a party under such an artificial distinction would be penalized, while a party exhibiting bad faith would be placed in favored position for pursuing his appeal. Obviously, such an illogical and unreasonable result should be avoided."

As a precautionary measure, the Appellant has appealed the judgment of the District Court to the Court of Appeals for the Fifth Circuit (Docket No. 21587) and within the next several days he intends to file with this Court a petition for writ of certiorari to the Court of Appeals, under 28 U. S. C. 1254 (1), prior to its rendition of judgment. In the event this Court disagrees with the above contentions and finds that only the Court of Appeals has jurisdiction of an appeal from the judgment of the District Court, then the appellant respectfully invokes the jurisdiction of this Court to review the judgment of the District Court by such writ of certiorari. **Turner v. City of Memphis** (1962), 369 U. S. 350, 11 L. ed. 602, 84 S. Ct. 636; **Stainback v. Mo Hock Ke Lok Po** (1949), 336 U. S. 368, 93 L. ed. 741, 69 S. Ct. 606.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 9 of the Senatorial Reapportionment Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides in pertinent part that:

> Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, **except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in**

which such Senatorial District is located. (The emphasis indicates the language invalidated by the District Court.)

Paragraph I of Section II of Article III of the Constitution of the State of Georgia (Ga. Code Ann., Sec. 2-1401), as ratified by the people on November 6, 1962, provides that:

> (a) Number and Apportionment of Senators. The Senate shall consist of fifty-four (54) members. The General Assembly shall have authority to create, rearrange and change Senatorial Districts and to provide for the election of senators from each Senatorial District, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable.
>
> (b) Interim Ratification. An Act providing for the reapportionment of the State Senate, enacted by the General Assembly at the extraordinary Session which convened on September 27, 1962, which Act made special provision for the election of Senators for the 1963-64 term and all elections held thereunder, are hereby ratified.

QUESTIONS PRESENTED.

Whether a state legislature, containing fifty-four senators, may divide a state into fifty-four senatorial districts according to population, some districts containing one or more counties and some counties containing two or more districts, and require that the senators from the districts containing one or more counties be elected by the voters within their respective districts, while also requiring that the senators from the multi-district counties be elected by the voters within their respective counties.

Whether that part of Section 9 of the Senatorial Reapportionment Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides that "the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located", denies to the Appellees the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

STATEMENT.

This is an appeal from the final judgment of a Three-Judge District Court for the Northern District of Georgia granting summary judgment against the Secretary of State of the State of Georgia and two local election officials in an action brought by three registered voters to invalidate, on Federal constitutional grounds, a State law requiring the county-at-large election of State senators in counties apportioned plural senatorial representation, and to enjoin such officials from complying with the provisions of the challenged law. The action originated out of the following circumstances.

In **Toombs v. Fortson,**[1] a three judge district court determined on May 25, 1962, that so long as the General Assembly of Georgia "does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements."[2]

On September 14, 1962, the Governor of Georgia issued his Proclamation[3] convening the General Assembly in extraordinary session on September 27, 1962, for the purpose, inter alia, of considering and enacting laws relating to the reapportionment of the Senate within the requirements of the **Toombs** case. Upon convening, the General Assembly expeditiously went about the business of considering the reconstitution of the Senate, which culminated on October 5, 1962, in the enactment into law of the Senatorial Reapportionment Act[4] apportioning the membership of the Senate entirely on a population basis as required by the **Toombs** case.

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[1] (D. C.—N. D. Ga.—1962), 205 F. Supp. 248.

[2] Id., p. 257, 1 col. (5). This determination was reiterated in a supplemental decision, dated September 5, 1962, which is unreported.

[3] Ga. Laws, Sept.-Oct. 1962, Extra Sess., pp. 3-5.

[4] Id., pp. 7-31.

The Act divided the State into fifty-four senatorial districts, twenty-one of which are wholly contained within the State's seven most populous counties.[5] The Act requires that "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located."[6]

Also during this extraordinary session, the General Assembly, by the requisite two-thirds constitutional majority in each House, adopted a Resolution[7] proposing the following Amendment to the State Constitution:

> Section 1. Article III, Section II, Paragraph I of the Constitution is hereby amended by striking said Paragraph in its entirety and inserting in lieu thereof the following:
>
> "Paragraph 1. (a) Number and Apportionment of Senators—The Senate shall consist of fifty-four (54) members. The General Assembly shall have authority to create, rearrange and change Senatorial Districts and to provide for the election of senators from each Senatorial District, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable.
>
> "(b) Interim Ratification—An Act providing for the reapportionment of the State Senate, enacted by the General Assembly at the extraordinary Session which convened on September 27, 1962, which Act made special provision for the election of Senators for the 1963-64 term and all elections held thereunder, are hereby ratified."

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[5] The map on page 52 of the Record shows the senatorial districts and the population per district.

[6] Id., p. 30, 1st par.

[7] Id., pp. 51-52 - Approved October 8, 1962.

Pursuant to this Resolution, the ballots and ballot labels used in the General Election held on November 6, 1962, contained the question as to whether the proposed Amendment should be ratified. At the Election, the people ratified such Amendment by a vote of 119,502 for and 75,598 against.[8] The Amendment carried in each of the multi-senatorial district counties except Bibb (R. 45-47).

On January 24, 1964, State Senator MacIntyre of the Fortieth Senatorial District (contained within Fulton County) and two registered voters of Fulton and DeKalb Counties, pursuant to 28 U. S. C. 1343 and 2201, filed a complaint in the United States District Court for the Northern District of Georgia (R. 4). This complaint alleged the adoption of the above statutory and constitutional provisions and sought the convocation of a three-judge district court pursuant to 28 U. S. C. 2281 and 2284, and asked that such court enter a judgment: declaring that the State law requiring the county-at-large election of State senators in the seven counties apportioned plural senatorial representation to be in violation of the Fourteenth Amendment to the Federal Constitution; and requiring that the senators from the seven multi-district counties be elected only by the voters of their respective districts; and enjoining the Appellant and the Ordinaries (election officials) of Fulton and DeKalb Counties from complying with the provisions of such State law (R. 8-9).

It is interesting to note that the complaint was filed during the early part of the 1964 regular session of the General Assembly,[9] and that a search of the legislative records reveals that no bill was introduced by Senator MacIntyre or any other member of the Legislature at

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[8] Ga. Laws, 1963, pp. 844-847. See also the Affidavit of the Secretary of State (R. 40-44).

[9] The General Assembly had convened in regular session on January 13, 1964, pursuant to Art. III, Sec. IV, Par. III of the St. Const. (Ann. Code, Sec. 2-1603).

either the 1963 or 1964 regular sessions to require such senators to run only within their respective districts (R. 48-51).

On February 18, 1964, the Appellant filed his answer and defense admitting the allegations of fact contained in the complaint, but denying that the Appellees were entitled to any relief (R. 15), and on March 6, 1964, he moved for the entry of summary judgment dismissing the action (R. 38). A cross motion for summary judgment was filed by the Appellees on March 13, 1964 (R. 88).

After oral argument, the District Court, on March 27, 1964, granted summary judgment in favor of the Appellees. In its opinion, the Court concisely stated the competing contentions of the parties in the following terms (R. 141):

> They (Appellees) state that the representatives elected in the plural district counties are not elected by those whom they represent since voters so situated do not have the opportunity of choosing their own senator, but must join with others to choose a group of senators. They assert, without contradiction, on the basis of the population of the various districts in Fulton County that only eighteen percent of the voters in the other six districts of that county can nullify the unanimous choice of the voters in the 34th Senatorial District and thrust a representative upon voters of that district for whom no one at all within the district had voted. Of course, this is carried to an extreme but it cannot be disputed that the selection of a senator from these districts is not within the control and province of the voters of the separate districts. By way of contrast, this is not the case with voters residing in districts not situated in plural district counties.

The Secretary of State urges that countywide voting is a rational and permissive classification in the interest of county government. He points to the fact that plaintiffs have a political remedy and have not availed themselves of it even though one of the plaintiffs is a member of the State Senate. It is argued that there has been no dilution or debasement of the votes of plaintiffs since the whole of the fractional parts, i. e., their being able to vote for more than one senator, is equal to the vote of one residing in a district where he votes for one senator only.

The District Court then drew an analogy from **Gray v. Sanders**[10] and determined that the challenged law created an invidious discrimination (R. 142). On April 6, 1964, the Court entered final judgment in accordance with its opinion (R. 146).

THE QUESTIONS ARE SUBSTANTIAL.

The decision of the District Court raises serious questions of widespread importance concerning the permissible scope of State action in developing and experimenting with legislative apportionments. The substantiality of these questions is illustrated by the following considerations.

A. No Mathematical Devaluation of the Vote.

The State Senatorial Reapportionment Act has allotted the voters of Fulton County seven Senators, the voters of Chatham and DeKalb Counties three Senators each, and the voters of Bibb, Cobb, Muscogee and Richmond Counties two each. The relief sought in the complaint affects only these seven most populous counties and is predicated upon the assumption that each of these counties had been apportioned the full number of senators required by its population (see also R. 23). Consequently, all

[10] (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801.

parties agree that it is legal for each district to elect one senator. The sole issue presented by this case is whether it is legal for the senators from the multi-district counties to be elected county-wide.

The present apportionment of both Houses of the General Assembly is predicated on the political autonomy of the counties. The people of Georgia through constitutional ratification have chosen to regard the county as an indivisible electoral unit in the election of the membership of the General Assembly. Consequently, the senators from those counties entitled to plural senatorial representation are elected county-at-large. The objective of such an at-large election is rational and intelligible because it stimulates unity and harmony within the senatorial delegation in seeking the attainment of the political goals of the county electorate. This position does not rest upon any theory of county sovereignty or upon any analogy between county and state, but merely upon the fact that county government over a period of years has produced an electoral homogeneity worthy of reflection in legislative representation.

The challenged method of electing senators in this case does not produce any mathematical devaluation of the vote. For example, let us compare the status of a Fulton County voter with one who resides in a rural district electing a single senator. The Fulton voter is a part of an electorate which is approximately seven times larger than the electorate of which the rural voter is a part, however, the Fulton County voter has the right to vote for seven senators whereas the rural voter may only vote for one. Theoretically, the rural voter would have a greater influence upon his single senator than the Fulton voter would have upon any one of his seven senators, but the latter's aggregate influence upon each of his senators would equal the rural voter's influence upon his single

senator. In other words, the Fulton voter has an advantage in being able to vote for seven senators, but this advantage is offset by his being a part of the large electorate necessary to support the representation of seven senators.

Another approach is helpful in analyzing this matter. In **Baker v. Carr,**[11] **Gray v. Sanders,**[12] and **Wesberry v. Sanders,**[13] this Court has espoused its "one man-one vote" formula of political equality. The most exact proportionate representation under this formula would be secured by making a single district of the State and electing all of the senators by the people at-large. Each voter would then have his absolute and equal weight with every other voter in selecting the senators. This arrangement would apparently be legal although the electorate would be greatly inconvenienced in attempting to intelligently fill fifty-four Senate seats. However, there would be no doubt that the "one man-one vote" formula had been applied with mathematical exactitude.

It is generally recognized that a state may apportion one of its legislative houses according to population by dividing the state into districts containing substantially equal populations and that such an apportionment would not violate the Equal Protection Clause. However, due to the never-ceasing occurrence of births, deaths and migrations, it is impossible to divide the State into fifty-four districts containing precisely equal populations. Therefore, in districting we are forced to accept the imprecise standard of substantial equality of population among the districts because no two districts could be or could long remain exactly equal to each other in population. Therefore, the voters in the lesser populated districts would have a slight, though permissible, political advantage over

[11] (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 691

[12] (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801

[13] (1964), 376 U. S. 1, 11 L. ed. 2d 481.

those voters in the more populous districts. Obviously, some discrimination is always inherent in districting.

In carrying this thinking a step further, let us consider the Fulton County Districts. This Court may judicially know that according to the 1960 Federal Census the Fulton Districts range in population from a low of 74,834 in the 40th (Appellee MacIntyre's) to a high of 82,888 in the 35th (R. 52). Consequently, if senators were elected only in their districts, then the voters of the 40th would have a stronger political voice in the Senate than the voters of the 35th. If, on the other hand, the senators are elected county-at-large, then these variations in political strength among the voters within the county would be eliminated and precise equality would reign county-wide.

According to the 1960 Census, no two of Georgia's fifty-four senatorial districts have equal populations (R. 52). This results in there being fifty-four shades of permissible discrimination in voting strength among the districts. However, if the twenty-one senators assigned to the seven multi-district counties are elected county-at-large, then these shades of permissible discrimination are reduced to forty. All parties agree that the election of senators within their districts is not invidiously discriminatory irrespective of the fifty-four permissible shades of discrimination. Therefore, why would not the challenged method of electing the Senate, which is less discriminatory, offend the Equal Protection Clause?

B. No Invidious Discrimination Between Single and Multi-Member Districts.

As we have seen, the State Senatorial Reapportionment Act divided the State into fifty-four senatorial districts and, by virtue of requiring at-large elections in multi-district counties, into forty senatorial constituencies. In effect, the Bill divided the State into thirty-three single-

member districts and seven multi-member districts. This districting results in the creation of **two** differences in treatment among the voters of the State in the election of senators. **First**, voters in the more populous districts have the opportunity of electing plural senatorial representation, while the voters in any other district may only elect the single senator apportioned to them. **Second**, the voters of a district within a county having plural senatorial representation are not permitted to wholly elect a senator to represent only their district, but are required to join with the voters of the other districts within the county in electing the senators assigned to the county.

As to the first difference, it is clear that the combination of single and multi-member districts in structuring one or both chambers of a bicameral legislature is widely practiced. Maurice Klain, in his work entitled "A New Look at the Constituencies: The Need for a Recount and a Reappraisal,"[14] demonstrates the prevalence of multi-member representative districts among the State legislatures. He states that:

> Only nine states choose all legislators in single-member elections: California, Delaware, Kansas, Kentucky, Missouri, Nebraska, New York, Rhode Island, and Wisconsin. Formerly, such states were fewer: most of the time, nonexistent.[15]
>
> Of 1,841 senate seats in 1954 only 221, a trifle over 12 per cent, are contested in multi-member ballotings. But these overall figures, lumping together 48 legislative bodies of different sizes, conceal the number, proportion, and identity of states which elect senators on a multi-member basis. There are 16 such states.
>
> If Alaska enters statehood with its present legislative forms, it will end Arizona's distinction as the only

[14] 49 American Political Science Review 1105 (1955).

[15] Id., p. 1106, last par.

state electing all senators on a multi-member schedule. Hawaii chooses just one of 15 senators in a single-member election.[16]

A panoramic view of the 48 houses (of representatives), including Nebraska's single chamber, reveals that (representatives elected by multi-member districts) add up to more than 45 per cent of the seats—2,616 of 5,762—and are distributed among three-fourths of the states. The 12 states which elect no multiple-district representatives are the nine first named above, plus Arizona, Utah, and Vermont.[17]

Among the 36 states which contain them, the 2,616 (representatives elected by multi-member districts) amount to more than 58 per cent, outnumbering nearly three to two the 1,870 representatives elected in single-member districts.[18]

Hawaii and Alaska, like three of the states, name all representatives in multiple elections.[19]

In view of these statements and other data supplied by Klain, it is clear that the paretice of combining both single and multi-member districts, or multi-member districts containing varying numbers of members, in structuring a legislative chamber, is and has been a widely prevalent practice among the States. Consequently, it is significant that none of the legislative apportionment cases and commentaries spawned by **Baker v. Carr**, of which counsel have knowledge, have condemned *per se* the employment of multi-member districts in such fashions. Rather, the attention of these courts and writers has been directed toward one basic question—whether the legislative apportionment under consideration reflects an irrational debasement of voting strength.

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[16] Id., p. 1107, 2d par.

[17] Id., p. 1108, last par.

[18] Id., p. 1109, 2d par.

[19] Id., p. 1111, 2d par.

Furthermore, federal courts have frequently approved apportionments of legislative chambers which were structured by the combination of single and multi-membered districts. **Moss v. Burkhart** (D. C.—W. D. Okl.—1963), 220 F. Supp. 149; **Daniel v. Davis** (D. C.—E. D. La.—1963), 220 F. Supp. 601; **Nolan v. Rhodes** (D. C.—S. D. Ohio—1963), 218 F. Supp. 953. Compare: **Baker v. Carr** (D. C.—M. D. Tenn.—1963), 222 F. Supp. 684.

In **Davis v. McCarty,**[20] the Oklahoma Supreme Court had under review State laws reapportioning the bicameral Oklahoma Legislature for the purpose of determining their compliance with State constitutional formulas. The State constitution required that the State be divided into forty-four senatorial districts, "each of which shall elect one senator; and the Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given such county in addition to the forty-four senators and the whole number to that extent."[21]

In construing this constitutional provision the Court held that "Where a county is apportioned two or more Senators because of the population factor, such senators may be elected by the voters at large in said county or from Senatorial districts therein where such districts are established according to law."[22] The Court further stated that:

> In **Jones v. Freeman** (1943), 193 Okla. 554, 146 P. 2d 564, we said that whether the additional senators from Oklahoma and Tulsa counties must be elected from separate districts within these counties, or at

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[20] Okla. Supreme Ct.—No. 40496—decided Nov. 6, 1963. The Court granted no relief in this case because of the decision in *Moss v. Burkhart* (D. C.—W. D. Okl.—1963), 220 F. Supp. 149.

[21] Okla. Const., Art. 5, Sec. 9 (a).

[22] Syllabus, 4th par.

> large by the voters of the counties, is not clear. We held that either method would be permissible, so long as substantial equality prevails. [23]

Sobel v. Adams[23] involved an action challenging the constitutionality of the Florida statute providing for a 43 senator and 112 representative legislature. In upholding the constitutionality of the statute, the three-judge court stated in part that:[24]

> The rejected constitutional amendment would have provided for 46 senators and 135 representatives. In some respects it might have advantages over the statutory plan now before us. For example, in our former opinion we thought the suggestion to give a single county more than one senator was unwise. We still have doubts as to the desirability of doing so. The statute gives two senators to Dade County. Although we would not have directed multiple senatorial representation for any county, **we certainly should not prohibit it if the state desires it. Our function begins and ends with the determination of rationality and whether there is invidious discrimination.** (Emphasis supplied.)

The office of the Secretary of State of the State of Florida advises that the two senators apportioned to Dade County will be elected county-at-large.

In view of these authorities, it is clear that the combination of single and multi-member districts within a legislative chamber does not constitute invidious discrimination **unless** it results in an unjustifiable population disparity. **Therefore, it follows that if the Georgia legislature had not districted the seven most populous counties, but had merely apportioned the proper number of senators to each, then the structuring of the Senate would have satisfied all constitutional standards.**

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[23] (D. C.—S. D. Fla.—1963), 214 F. Supp. 811.

[24] Id., p. 812, 1. col. 2d par.

Turning to the second difference referred to above, this Court may judicially know that the City of Atlanta is divided into eight wards with two aldermen from each, who are elected city-at-large,[25] and that this electorial practice epitomizes a widely prevalent method of electing municipal and county legislative bodies throughout the Nation.[26] Obviously, this method of electing representatives does not constitute invidious discrimination unless it should produce population disparities in voting strength.

Nevertheless, the Appellees have contended that the county-at-large election of senators "results in invidious discrimination against the voters in any senatorial district in Georgia which is comprised of less than an entire County because in any such district the representative chosen by the voters may be defeated by the votes of persons not residing in that district" [R. 26, see also R. 7-8 (complaint)].

This contention is untenable. Upholding it would invalidate the method of electing a vast number of aldermen in cities across the Nation, not on the basis of ward population disparities, but simply because their charters

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[25] Ga. Laws, 1952, pp. 2635-2637, Secs. 1, 3 and 4.

[26] *The Municipal Yearbook* (1963), at p. 105, fn. 2, states that: "The 55 cities which elect at-large councilman nominated by wards are: Ozark, Alabama; Tucson, Arizona; El Dorado, Arkansas; Alhambra, Compton, Long Beach, Newport Beach, Oakland, San Diego, San Leandro, Santa Ana, and Stockton, California; Greeley, Colorado; Wilmington, Delaware; Belle Glade, Bradenton, St. Petersburg, and Tampa, Florida; La-Fayette, Georgia; Lexington, Kentucky; Portland, Maine; Chelsea and Springfield, Massachusetts; Cadillac, Holland, Inkster, Jackson, and Lansing, Michigan; Columbia, Mississippi; Poplar Bluff and Springfield, Missouri; Concord, New Hampshire; Raritan, New Jersey; Niagara Falls, New York; Jacksonville, New Bern, and Rocky Mount, North Carolina; Elk City, Enid, Guymon, Midwest City, Okmulgee, and Pawhuska, Oklahoma; Springfield, Oregon; Charleston and Greer, South Carolina; Columbia, Tennessee; Dallas, Ennis, Hillsboro, Mesquite, and Nederland, Texas; Ogden, Utah; Clarkston and Sumner, Washington."

require that the candidates from the various wards run city-at-large.

One of the reasons frequently attributed for Atlanta's good government is the fact that its aldermen are elected at-large with the result that they are permitted to consider measures in the light of the interests of the City as a whole, instead of being limited by parochial viewpoints engendered by ward election. If such a method of electing aldermen is beneficial for the City of Atlanta, then why would not the same method of electing senators be beneficial for Fulton County?

If this contention of the Appellees is sound, then it would not only invalidate a technique of apportionment frequently built into state, county and municipal legislatures, but would also deprive the courts of one of their most effective remedies in eradicating legislative mal-apportionments. For example, suppose the legislature had required that Fulton's senators run only within their districts and had then drawn these district lines in such a manner as to create egregious population disparities among the districts. In eliminating this mal-apportionment, would it not be much better for the court to order a county-at-large election for the senators, rather than to undertake the making of the classic legislative judgments involved in drawing district lines? Obviously, such lines could not be drawn without affecting partisan interests.

Under the Senatorial Reapportionment Act, the seven most populous counties are divided into districts of substantially equal population. The sole purpose of this districting is to insure geographical representation of different sections of each county. The legislature could have allotted the senators to each county without districting it, but this would have permitted the election of all the senators from the same part of the county.

In our consideration of these two differences (single and multi-member districts and county-at-large elections) we have found that both are equally inoffensive to constitutional standards. Consequently, why does the joining of these two differences in structuring the Georgia Senate produce invidious discrimination?

C. The Contours of Equal Protection.

In **Baker v. Carr,**[27] the plaintiffs contended that the structure of the Tennessee legislature effected a gross disproportion of representation to voting population, and thereby placed them in a position of constitutionally unjustifiable inequality. The majority opinion of this Court concluded that the "right asserted is within the reach of judicial protection under the Fourteenth Amendment."[28]

The concurring opinion of Justice Douglas in **Baker** casts a great deal of light upon the thinking of the majority. He defined the scope of the Equal Protection Clause in the following terms:[29]

> There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?
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> The traditional test under the Equal Protection Clause has been whether a State has made "an invidious discrimination," as it does when it selects "a particular race or nationality for oppressive treatment." See **Skinner v. Oklahoma,** 316 U. S. 535,

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[27] (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 961

[28] Id., 369 U. S. 237, 2d par., 7 L. ed. 2d 697, 1. col., last par.

[29] Id., 369 U. S. 244, 4th par., 7 L. ed. 2d 701, 1. col. 4th par.

541, 86 L. ed. 1655, 1660, 62 S. Ct. 1110. Universal equality is not the test; there is room for weighting. As we stated in **Williamson v. Lee Optical of Okla., Inc.**, 348 U. S. 483, 489, 99 L. ed. 563, 573, 75 S. Ct. 461. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Justice Clark in his concurring opinion stated that:[30]

> The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters elect 63 of the 99 members of the House. But this might not on its face be an "invidious discrimination," **Williamson v. Lee Optical of Okla., Inc.**, 348 U. S. 483, 489, 99 L. ed. 563, 573, 75 S. Ct. 461 (1955), for a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." **McGowan v. Maryland**, 366 U. S. 420, 426, 6 L. ed. 2d 393, 399, 81 S. Ct. 1101 (1961).

And Justice Stewart in his concurring opinion stated that:[31]

> In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term—that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." **McGowan v. Maryland**, 366 U. S. 420, 425, 6 L. ed. 2d 393, 399, 81 S. Ct. 1101. In case after case arising under that Clause we have also said that "the burden of establishing the unconstitutionality of a statute rests on him who assails it." **Metropolitan Casualty Ins. Co. v. Brownell**, 294 U. S. 580, 584, 79 L. ed. 1070, 1072, 55 S. Ct. 538.

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[30] Id., 369 U. S. 253, 2d par., 7 L. ed. 2d 707, 1 col., 1st par.
[31] Id., 369 U. S. 266, 1st par., 7 L. ed. 2d 714, 1 col., 2d par.

Today's decision does not turn its back on these settled precedents.

These opinions clearly illustrate that this Court intends that the traditional tests under the Equal Protection Clause are the ones to be applied in determining the validity of state legislative apportionments. Obviously, this Court did not attempt to create any new judicial standards for courts to apply when faced with a claim of arbitrary state action in the field of legislative apportionment.

More recently in **Norvell v. Illinois**,[32] this Court had before it a case in which the petitioner was convicted of murder in a state court at a trial in 1941, in which he, though indigent, was represented by a lawyer. He was unable to obtain a transcript and did not pursue an appeal from his conviction. In 1956, the petitioner made a motion in which the trial court was requested to furnish a stenographic transcript of his trial. However, no such transcript was available due to the death of the court reporter. The state courts denied the petitioner a new trial and he filed his application for certiorari with this Court. Upon appeal, he relied upon **Griffin v. Illinois**[33] holding on the facts of that case that it was a violation of the Fourteenth Amendment to deprive a person because of his indigency of any rights of appeal afforded all other convicted defendants.

This Court granted the application for certiorari and in an opinion by Justice Douglas, expressing the views of six members of the Court, held that under the circumstances the denial of post-conviction relief to the petitioner did not violate the Due Process or Equal Protection

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[32] (1963), 373 U. S. 420, 10 L. ed. 2d 456, 83 S. Ct. 1366, reh. den., 375 U. S. 870, 11 Fed. 2d 99, 84 S. Ct. 27.

[33] 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585, 55 A. L. R. 2d 1055.

Clauses of the Fourteenth Amendment. This Court expressed its views on the scope of the Equal Protection Clause in the following terms:[34]

> As we said in **Tigner v. Texas**, 310 U. S. 141, 147, 84 L. ed. 1124, 1128, 60 S. Ct. 879, 130 A. L. R. 1321:
>
> ". . . The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."
>
> When, through no fault of the State, transcripts of criminal trials are no longer available because of the death of the court reporter, some practical accommodation must be made. We repeat what was said in **Metropolis Theatre Co. v. Chicago**, 228 U. S. 61, 69, 70, 57 L. ed. 730, 734, 33 S. Ct. 441.
>
> "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. . . . What is best is not always discernible; the wisdom of the choice may be disputed or condemned."
>
> The "rough accommodations" made by government do not violate the Equal Protection Clause of the Fourteenth Amendment unless the lines drawn are "hostile or invidious". **Welch v. Henry**, 305 U. S. 134, 144, 83 L. ed. 87, 92, 59 S. Ct. 121, 118 A. L. R. 1142. We can make no such condemnation here.

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[34] 373 U. S. 423, last par., 10 L. ed. 2d 459, r. col., 1st par.

And in **Hearne v. Smylie**[35], involving an attack upon the apportionment and manner of election of Idaho legislators, a three-judge district court held that:[36]

> So we treat with plaintiffs' contention that Idaho's apportionment method defies the mandate of the Fourteenth Amendment's "equal protection" clause. As Mr. Justice Van Devanter wrote for a unanimous Court in **Lindsley v. Natural Carbonic Gas Co.**, 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911):
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> "The rules by which this contention [violation of equal protection] must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify • • • but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." [220 U. S. at 78-79, 31 S. Ct. at 340, 55 L. Ed. 369; see also, **Morey v. Doud**, 354 U. S. 457, 463-466, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957).]
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> Recently the Court has restated these rules by declaring succinctly that a "statutory discrimina-

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[35] (D. C.—D. Idaho—1964), 225 F. Supp. 645.

[36] Id., p. 650, l. col., 3d par.

tion will not be set aside if any state of facts reasonably may be conceived to justify it". [**McGowan v. Maryland**, 366 U. S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961).]

In **McGowan v. Maryland**, 366 U. S. 420, 425-426, 81 S. Ct. 1101, 1104-1105, 6 L. Ed. 2d 393, in referring to the question as to whether under the circumstances of that case charging that certain provisions of the state statute were arbitrary and capricious, this Court said:

> The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. **A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.** (Emphasis added.)

In 1931 the late Mr. Justice Holmes, speaking for this Court in **Bain Peanut Co. v. Pinson**, 282 U. S. 499, 501, 51 S. Ct. 228, 229, 75 L. Ed. 482, said: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."[37]

In **Moss v. Burkhart**,[37] the district court reapportioned the Oklahoma legislature by judicial decree. The decree apportioned the senators among the various counties according to population and concluded with the proviso[38]

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[37] (D. C.—W. D. Okl.—July 17, 1963), 220 F. Supp. 149.

[38] Id., p. 157, 1 col., last par.

that "until the Legislature, as apportioned hereunder, shall by appropriate legislation prescribe the boundaries of the Districts, within any one County of the State entitled to elect more than one Senator, under the provisions of this Order, the candidates for such senatorial offices shall be nominated and elected at large within such Counties". The decree apportioned the representatives in the same manner and again concluded with the proviso[39] that "until the Legislature, as apportioned hereunder, shall by appropriate legislation prescribe the boundaries of the Districts, within any one County of the State entitled to elect more than one Representative, under the provisions of this Order, the candidates for such representative office shall be nominated and elected at large within such Counties".

Obviously, the decree did not place the reapportioned legislature under any affirmative duty to district the counties having plural representation. Therefore, the court in effect upheld the same method of electing representatives which is attacked in this action.

Furthermore, the latest **Baker v. Carr** district court decision[40] impliedly upholds the at-large election of senators in the counties assigned plural senatorial representation. The senate committee justified this method of election in the following terms:[41]

> "The Tennessee Constitution forbids that any county shall be divided in forming a senatorial district. As a practical matter this means that every voter in Shelby County will be entitled to vote for and participate in the election of **five** senators; and the voter in Davidson County in the election of three senators. This provision assures to the voters in such

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[39] Id., p. 160, l. col., 1st par.

[40] (D. C.—M. D. Tenn.—Oct. 10, 1963), 222 F. Supp. 684

[41] Id., p. 689, l. col., last par.

> counties the practical opportunity to exert greater political weight by the election of a slate or ticket backed by a political organization and both supported and publicized by a metropolitan press. The voter in a multi-county district has no such opportunity.

Jones v. Freeman,[42] involved a mandamus action to test the validity of various Oklahoma legislative apportionment acts under the then state constitution which required that the senatorial districts shall "contain as near as may be an equal number of inhabitants".[43] In its opinion, the Court stated that:[44]

> Upon the question of whether the two additional Senators from Oklahoma County and the one additional Senator from Tulsa County must come from separate districts or may be elected from other districts or at large by the voters of the counties, the Constitution is not clear. Either method would be permissible, so long as substantial equality prevails.

See also: **Preisler v. Doherty** (1955), 365 Mo. 469, 284 S. W. 2d 427 (11); **Graham v. Special Commissioners of Suffolk County** (1940), 306 Mass. 237, 27 N. E. 2d 995, 999, r. col., 1st par.; **Brophy v. Suffolk County Apportionment Com'rs** (1916), 225 Mass. 124, 113 N. E. 1040; and **Daniel v. Davis** (D. C.—E. D. La.—1963), 220 F. Supp. 601, 602, r. col., last par.

In view of these authorities, it is clear that the State is to be allowed every reasonable latitude in the field of legislative apportionment, and any device therein will not be set aside if any state of facts reasonably may be conceived to justify it.

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[42] (1944); 193 Okla. 554, 146 P. 2d 564, app. dism. 322 U. S. 717, 88 L. ed. 1558, 64 S. Ct. 1288.

[43] Id., 146 P. 2d 567, r. col., 1st par.

[44] Id., 146 P. 2d 574 (17).

D. The Presumption of Constitutionality.

In **W. M. C. A., Inc. v. Simon,**[45] the New York legislative apportionment case, the district court held that:[46]

> The principle that there is a presumption in favor of the constitutionality of a statute and the principle that a violation must be clear before a federal court of equity will lend its power to the disruption of the state election processes (**Sanders v. Gray,** D. C. N. D. Ga. 1962, 203 F. Supp. 158, 170) have been re-enunciated in apportionment decisions rendered since the **Baker v. Carr** determination.
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> 1. In **Caesar v. Williams,** Supreme Court of the State of Idaho, April 3, 1962, 371 P. 2d 241, 9 Idaho Capital Report 161, McFadden, J., wrote:
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> "In considering the question of the constitutionality of these acts, certain fundamental rules at all times must be kept in mind. The burden of showing the unconstitutionality of a statute is upon the party asserting it. **Eberle v. Nielson,** 78 Idaho 572, 306 P. 2d 1083; **Rich v. Williams,** 81 Idaho 311, 341 P. 2d 432. This court is without power to invalidate or nullify a constitutional act of the legislature; if the legislature does not clearly violate the Constitution, this court must and will uphold it. **Padgett v. Williams,** 82 Idaho 114, 350 P. 2d 353. Every reasonable presumption must be indulged in favor of the constitutionality of a statute. **Robinson v. Enking,** 58 Idaho 24, 69 P. 2d 603; **Idaho Gold Dredging Co. v. Balderston,** 58 Idaho 692, 78 P. 2d 105." (9 Idaho Capital Report 161 at 164.)
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> 2. In **Maryland Committee for Fair Representation v. Tawes,** Md. Cir. Ct., Anne Arundel County, May 24, 1962, Md., Judge Duckett wrote in part:

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[45] (D. C.—S. D. N. Y.—1962), 208 F. Supp. 368.

[46] Id., at p. 373, r. col.

> "Every intendment must be resolved in favor of constitutionality and the burden of showing unconstitutionality is on the petitioners"

citing **McGowan v. Maryland**, 366 U. S. 420-426, 81 S. Ct. 1101, 6 L. Ed. 2d 393; **John Hopkins University v. Williams**, 199 Md. 382, 86 A. 2d 892; **Norris v. Baltimore**, 172 Md. 667, 192 A. 531.

3. In **Toombs v. Fortson**, D. C. N. D. Ga. 1962, 205 F. Supp. 248, 256, the Statutory Court stated:

> "* * * there is an additional factor of importance when the Federal Court is called upon to invalidate solemnly enacted State constitutions and laws. Bearing in mind the plain lesson laid down by the Supreme Court repeatedly that an **alleged violation of constitutional rights by the State must be clear** before a Federal Court of equity will lend its power to the disruption of the State election processes * * *." (Emphasis inserted.)

To the same effect see: **Davis v. Synhorst** (D. C.—S. D. Iowa—1963), 217 F. Supp. 492, at 497, r. col., 2d par.; **Clark v. Carter** (D. C.—E. D. Ky.—1963), 218 F. Supp. 448, at p. 451 (2); and **Lisco v. McNichols** (D. C.—D. Col. —1962), 208 F. Supp. 471, at p. 477, r. col., last par.

E. The Rationality of County-at-Large Elections.

Historically, the counties of Georgia are the basic units of representation and local government.[47] Georgia, since earliest times, has consistently emphasized county govern-

[47] See *Sanders v. Gray* (D. C.—N. D. Ga.—1962), 203 F. Supp. 158, at pp. 161-163. The following cases recognize that the historical basis of counties is an important factor to consider in making the test as to whether invidious discrimination exists in legislative apportionment: *Davis v. Synhorst* (D. C.—S. D. Iowa—1963), *W. M. C. A., Inc. v. Simon* (D. C.—S. D. N. Y.—1962), 208 F. Supp. 368, at pp. 374, r. col., 3d par., 376, l. col., 4th par.

ment and the county unitary approach. A county is a political subdivision of the State, created for administrative purposes, is representative of the sovereignty of the State and auxiliary to it. Its functions are of a public nature; it is political in character, and constitutes the machinery by and through which many of the powers of the State are exercised.[48] Consequently, the operations of county government over a period of years produces a degree of solidarity from economic, social and political causes. In other words, a county generally reflects a fairly solid unit of political thinking.

In view of these considerations, it is a rational and intelligible objective for the State to seek to preserve the political integrity of counties in the representation of interests in the General Assembly. The same advantages experienced by a multi-ward city whose aldermen run city-at-large, are also experienced by a multi-district county whose senators run county-at-large. These advantages to the city are well described in the following excerpt:[49]

> The election of councilmen by wards under normal conditions has certain obvious advantages. First, it gives the voter in the council election a short and simple ballot. Second, it gives him the opportunity of selecting someone living near him about whom it should be possible to get personal information. Third, insofar as the wards have peculiar and special interests, it provides means for their representation in the council.
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> The people in the United States have in recent years been inclined to give more weight to the argu-

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[48] Compare: *Sobel v. Adams* (D. C.—S. D. Fla.—1962), 208 F. Supp. 316, at p. 322, 1. col.; 6 *E. G. L.*, Counties, Sec. 2, p. 522.

[49] *American City Government* (1950—Revised Ed.), by Anderson and Weidner, pp. 404-406. See also *Governing Urban America* (1955), by Charles R. Adrian, p. 233.

ments against the ward system than to those in its favor. Residence within the ward has come to be almost everywhere a prerequisite to election from the ward.

Considering the manner in which people in cities draw themselves apart from each other for residence purposes, it is not surprising that some wards are left without adequate aldermanic material. Even the labor leaders may chance to be grouped all in one ward, and some of them may be in wards where they have no chance of election. The result is often a narrow restriction of the range of choice and in some wards the election to the council of men not up to the general standard. Furthermore, the basis upon which selection is made within the ward tends to be that of service to the ward instead of ability to serve the city. A ward alderman is expected to get something for his ward—some street improvement or a public building or at least work and help for needy constituents. If he must indulge in logrolling to get results, his action will be condoned by his constituents, whereas to come home with "clean but empty hands" is considered a proof of weakness in aldermen as well as in ambassadors. It scarcely needs to be said that many of the men who engage in such a scramble for spoils and ward improvements are a distinctive type whose presence in the council in large numbers is almost certain to give it a low moral tone.

The ward system gives very unequal results in the matter of representation. If the city be gerrymandered —and it is likely to be—then one of the parties is reasonably sure to be under-represented or at least to feel that it is. Even where the original ward lines are made carefully and honestly, the rapid shifting and growth of population in cities soon upsets the entire division of representation. Once established, however, and even when there was little reason for them in the first in-

stance, ward lines tend to become fixed, almost unchangeable. It is not uncommon, therefore, to find cases of minority rule continued for years and even decades.

Other defects can easily be found. Ward lines are not, as a rule, the natural boundaries of distinct geographical areas or social groups but rather artificial or merely traditional limits. The aldermen elected from wards are never responsible to the city as a whole. Certain groups that have respectable numbers of voters but not enough to carry any ward may find themselves wholly unrepresented or very poorly represented by some fusion candidate. Indeed under the ordinary system of voting, even if the wards are all practically equal in population, the ward system of election may result in anything from absolute dominance of the council by a plurality party to a fair apportionment of representation among all groups and parties. To control the council a party needs only to carry a majority of the wards, and this it may do by a bare majority or plurality in each ward as the case may be.

Let us suppose a simple case of five wards, substantially equal, and only two parties, one of which is, however, handicapped by having a concentration of its voting power in one ward, which is not an uncommon case (see Table 24). The illustration here given may be considered an extreme case, but such cases are not entirely imaginary.

Table 24. A sample election by wards.

	Ward 1	Ward 2	Ward 3	Ward 4	Ward 5
Party A vote	6,200	6,300	6,500	6,400	3,000
Party B vote	5,800	5,700	5,500	5,600	9,000
Aldermen elected	A	A	A	A	B

Total vote, both parties, 60,000 ..... 100%
Total A vote, 28,400 ..... 47⅓%
Total B vote, 31,600 ..... 52⅔%
A members in council number 4, or 80 percent of total.
B members in council number 1, or 20 percent of total.
7,100 votes elected each A member; 31,600 votes succeed in electing only one B member.

The assumption behind the ward system of representation is that men are best represented on the basis of the geographical areas in which they live. Such an assumption is less true today than it ever was. In a mobile and diversified population, men divide in a variety of ways—on the basis of their occupation, the level of their incomes, their religion, their racial and ethnic characteristics, their philosophies, their parties. A geographical factor may be added to this list, but it is only one of many items of importance, and it does not wholly conform to any of the others. If councilmen are elected at large, especially if by proportional representation, groups of voters do not have to rely upon geographical concentration of strength in order to assure themselves of representation.

Election at large—By the election of councilmen at large a city gains certain obvious advantages. Ward boundaries are for all practical purposes wiped out. Gerrymandering becomes impossible. The parties or other groups may put forward their best men, no matter where they live in the city. Being elected from and responsible to the city as a whole, the councilmen must put more stress upon general city-wide problems both in the campaign and in office than upon the special needs of little districts. Furthermore, when elected at large the council practically must be a small body. There is reason to believe, therefore, that somewhat abler men will be chosen.

By an Act approved September 24, 1959 (Pub. Law 86-380, 73 Stat. at L. 703), the Congress established an Advisory Commission on Intergovernmental Relations and assigned it the duties, *inter alia*, of encouraging discussion and study at an early stage of emerging public problems that are likely to require intergovernmental cooperation and of recommending, within the framework of the Constitution, the most desirable allocation of governmen-

tal functions, responsibilities, and revenues among the several levels of government.

On December 13, 1962, the Commission issued its Report entitled "Apportionment of State Legislatures",[50] which included the recommendation, *inter alia*, that "'Equal protection of the laws' would seem to presume, and considerations of political equity demand, that the apportionment of both houses in the State legislature, be based strictly on population."[51] Although the Commission is population oriented in apportionment matters, it nevertheless recognizes the value of preserving the territorial integrity of a county in districting. For instance, the Commission included within its conclusions and recommendations the following statement:

> Only one procedure has been developed that can eliminate the problem of drawing district lines. This procedure would base representation permanently on political subdivisions or on geographic areas which may or may not take population into consideration. Population may be a factor by permitting those units with larger populations to elect more than one legislator but by requiring all such legislators to be elected at large. Thus, the need to draw district lines after each apportionment is eliminated.

Furthermore, federal courts have frequently approved districting plans which utilized county lines. **Moss v. Burkhart** (D. C.—W. D. Okla., 1963), 220 F. Supp. 149; **Daniel v. Davis** (D. C.—E. D. La., 1963), 220 F. Supp. 601; **Nolan v. Rhodes** (D. C.—S. D. Ohio, 1963), 218 F. Supp. 953. Compare: **Baker v. Carr** (D. C.—M. D. Tenn., 1963), 222 F. Supp. 684.

These considerations clearly demonstrate that requiring at-large elections in multi-district counties is a ra-

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[50] U. S. Government Printing Office, Washington 25, D. C.

[51] Id., p. 67, 2d par.

tional and reasonable legislative objective which is not precluded by the Equal Protection Clause. The question before the Court is not whether this requirement is wise or unwise, but simply whether it is invidiously discriminatory. Manifestly, the requirement reflects a rational policy fully consistent with the principles of the Equal Protection Clause. The Court should be loath to discard an operative system of government on the basis of the vague and untenable contentions of invidious discrimination advocated by the Appellees.

F. The Solemnity of the Challenged Enactment.

Soon after the enactment of the State Senatorial Reapportionment Act on October 5, 1962, doubt arose as to whether the Georgia Constitution permitted the Senators from the multi-district counties to be elected county-at-large.[52] In order to eliminate any question as to the validity of such at-large elections, the General Assembly adopted a Resolution[53] proposing an Amendment to the Constitution whose chief significance was to expressly authorize and ratify this method of election. The proposal was submitted to the people at the 1962 General Election as a separate and distinct measure which was voted upon individually. If the people had rejected such proposal then the apportionment of the Senate according to population would not have been affected, except to the extent that the Georgia courts might finally have determined under the State Constitution that the Senators from the multi-district counties would have to be elected within their respective districts. Obviously, no catastrophe would have befallen the people had they rejected the proposed Amendment. Nevertheless, the people ratified the Amendment by a vote of 119,502 for

[52] See *Finch v. Gray* (Fulton Superior Ct.—No. A 96441) and in particular the Orders of October 20 and 30, 1962.

[53] Ga. Laws, Sept.-Oct. 1962, Extra Sess., pp. 51-52.

and 75,598 against. The Amendment carried in each of the multi-district counties except Bibb.

Ratification of a constitutional provision by the people is the most solemn form of political enactment. In **Lisco v. Love,**[54] involving a Colorado legislative apportionment suit, a three-judge district court analyzed the sanctity of the people's choice in the following terms:[55]

> The initiative gives the people of a state no power to adopt a constitutional amendment which violates the Federal Constitution. Amendment No. 7 is not valid just because the people voted for it. If the republican form of government principle is not a useable standard because it poses political rather than judicial questions, the observation is still pertinent that Amendment No. 7 does not offend such principle. If the true test is the denial of equal right to due process, we face the traditional and recognized criteria of equal protection. These are arbitrariness, discrimination, and lack of rationality. The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behavior of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary.
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> The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. At the most they present a political issue which they

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[54] (D. C.—D. Col.—1963), 219 F. Supp. 922.

[55] Id., p. 932, r. col., 3d par.

lost. On the questions before us we shall not substitute any views which we may have for the decision of the electorate. In **Ferguson, Attorney General of Kansas v. Skrupa**, 372 U. S. 726, 731, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93, the Supreme Court said that it refused to sit as a "super-legislature to weigh the wisdom of legislation." Similarly, we decline to act as a superelectorate to weigh the rationality of a method of legislative apportionment adopted by a decisive vote of the people.

We believe that no constitutional question arises as to the actual, substantive nature of apportionment if the popular will has expressed itself. In **Baker v. Carr** the situation was such that an adequate expression of the popular view was impossible. In Colorado the liberal provisions for initiation of constitutional amendments permit the people to act—and they have done so. If they become dissatisfied with what they have done, a workable method of change is available. The people are free, within the framework of the Federal Constitution, to establish the governmental forms which they desire and when they have acted the courts should not enter the political wars to determine the rationality of such action.

The preference of the people of Georgia for the Senators from the multi-district counties to be elected county-at-large, as expressed by constitutional ratification, negates the presence of invidious discrimination. Compare: **Davis v. Synhorst** (D. C.—S. D. Iowa—1963), 217 F. Supp. 492, at p. 498, r. col., 1st par.; **W. M. C. A., Inc. v. Simon** (D. C.—S. D. N. Y.—1962), 208 F. Supp. 368, at pp. 374, r. col., 3d par., 379, r. col., 1st par.; and **Toombs v. Fortson** (D. C.—N. D. Ga.—1962), 205 F. Supp. 248, at p. 256, 1 col., 2d par.

G. The Availability of an Adequate and Untried Political Remedy.

One of the curious aspects of this case is the fact that the Appellees, one of whom is a State senator, have made no effort to pass legislation at either the 1963 or 1964 Regular Sessions of the General Assembly to amend the State Senatorial Reapportionment Act so as to require senators in multi-district counties to be elected within their respective districts. The chance of such legislation being adopted would appear to be quite good because it would only affect seven counties and there apparently would be no urban-rural conflict over such an amendment. This likelihood was recognized by Circuit Judge Bell at the hearing held before the District Court on March 17, 1964. The Judge stated that "I have no doubt this statute would be changed in the Legislature if somebody would get over there and make some effort to do it" (R. 97).

The availability of an adequate political remedy is generally accorded great weight in determining whether relief should be granted under the Equal Protection Clause. Compare: Concurring opinion of Justice Clark in **Baker v. Carr** (1962), 369 U. S. 258, last par., 7 L. ed. 2d 709, l. col., last par.; **Davis v. Synhorst** (D. C.—S. D. Iowa—1963), 217 F. Supp. 492, at pp. 498, l. col., last par., 504, l. col.; **Lisco v. Love** (D. C.—D. Col.—1963), 219 F. Supp. 922, at p. 933, l. col., 2d par.; **W. M. C. A., Inc., v. Simon** (D. C.—S. D. N. Y.—1962), 208 F. Supp. 368, at pp. 374, r. col., 3d par., 378, l. col., last par.; **Sanders v. Gray** (D. C.—N. D. Ga.—1962), 203 F. Supp. 158, at p. 169, r. col., last par.; **Toombs v. Fortson** (D. C.—N. D. Ga.—1962), 205 F. Supp. 248, at p. 255, r. col., last par.; and **Nolan v. Rhodes** (D. C.—S. D. Ohio—1963), 218 F. Supp. 953, at p. 958, l. col., 1st par.

Irrespective of these authorities, the District Court determined that the decision of this Court in **Wesberry v. Sanders,**[56] had abolished the rule that a court should deny relief in legislative apportionment matters where an adequate political remedy exists. The Appellant believes that the District Court has misconstrued **Wesberry** in this respect. In **Wesberry**, the plaintiffs vigorously contended that any chance for political relief was remote because of the long-standing inaction of Congress in this matter and because the Georgia House of Representatives was under rural domination. Comments from the Bench during oral argument indicated that several Justices agreed with this contention.

By contrast, political relief in this case is clearly available because only seven counties are directly involved and it appears unlikely that there would be any serious opposition to an amendment to require senatorial candidates to run district-wide in these counties. Furthermore, one of the Appellees is a State senator who has made no effort whatsoever to exercise his legislative remedy.

In **Spahos v. Mayor and Councilmen of the Town of Savannah Beach**[57] the plaintiffs challenged under the Equal Protection Clause the constitutionality of state statutes permitting non-resident real property owners of the municipality who reside in Chatham County to vote in the elections of the municipality along with residents who may or may not own real property, and providing that three of the town councilmen shall be elected from that class of voters who reside in Chatham County outside the corporate limits of the municipality. The district court dismissed the complaint for a want of equity and in so doing held, *inter alia*, that:[58]

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[56] (1964), 376 U. S. 1, 11 L. ed. 481.

[57] (D. C.—S. D. Ga.—1962), 207 F. Supp. 688.

[58] Id., p. 691, r. col., 4th par.

This is for the reason that the case of plaintiffs is fatally deficient in two other respects. First, the "strangle hold" situation present in **Baker v. Carr**, which we view as the *sine quo non* of that decision is not present here. The plaintiffs there had been unable through the course of many years to obtain what the Tennessee Constitution guaranteed them. No state constitutional guaranty against such non-resident voters is present here.

Plaintiffs assert rights under, and discrimination proscribed by, the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Political rights, such as the right to vote, are protected by the equal protection clause. **Baker v. Carr**, supra; **Sanders v. Gray**, supra. But discrimination must reach the point of invidiousness to become actionable, and here the discrimination, if there is discrimination on the theory of allowing non-residents to vote in the municipality along with residents, when such is not done in other municipalities within Chatham County or within Georgia, is not invidious if there is a reasonable chance that political relief can be obtained. The legislative history heretofore set out amply demonstrates that there is. In fact, complete relief was obtained under the 1947 Act. Furthermore, there is no proof that the assistance of the mayor and council who could intercede with the Chatham County legislative delegation, has been sought. There is no "strangle hold" here within the meaning of **Baker v. Carr**. . . .

Admittedly the desired end may be obtained in less time through the judicial process but the courts are not empowered to grant dispensations normally forthcoming through the legislative process. Courts can only do the minimal necessary to accord constitutional rights where they are being withheld, and then only on clear proof that they may not be otherwise obtained.

The plaintiffs in **Spahos** then appealed to this Court and on December 10, 1962, it affirmed the lower court in a *per curiam* opinion.[59] **The same Justices that unanimously affirmed Spahos are still on the Bench today.**

A corollary to the rule expressed by **Spahos** is the theory that a state has not acted irrationally or invidiously where it has provided an adequate political remedy for the correction of the alleged grievance.[60]

Consistent with this rationale, Justice William O. Douglas, in his book, "We, the Judges" (1956), made the following observations:

> Political action is another method of deciding certain controversies. Not all victories for human rights have been won in the courts. In the Western world, more such victories have probably been won in constitutional conventions or legislative halls than in courts of law. The remedy for unwise, improvident legislation is at the polls. Political action is, indeed, a versatile remedy for the correction of injustices. (Page 56, 2d par.)
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> . . . Litigation is not the cure-all, the solution for every conflict. If all our disputes and differences had

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[59] 371 U. S. 206, 9 L. ed. 2d 269, 83 S. Ct. 304. Compare: *Pobo v. Mayor and Councilmen of the Town of Savannah Beach* (1960), 216 Ga. 12, 114 S. E. 2d 374, aff'd (1960), 364 U. S. 400, 5 L. ed. 2d 185, 81 S. Ct. 181.

[60] "Whether the state affords the people another reasonable remedy.—Even if the malapportionment is gross, it may well not violate the Fourteenth Amendment if the state, unlike Tennessee, affords its people an alternative remedy. For example, the majority cannot complain too seriously about their underrepresentation in the state legislature in a state which provides for referenda initiated by a reasonable number of voters. Under such a system, the majority can reapportion the legislature itself. . . . But if the state provides a feasible political remedy, it might be concluded that the state has not been so arbitrary as to violate the Fourteenth Amendment." Brief for the United States as Amicus Curiae, filed May 14, 1961, in *Baker v. Carr*, Transcripts of Records and File Copies of Briefs 1961), Vol. 31, Part 2, p. 68.

> to go to the courts, we would indeed be bogged down in time-consuming, wasteful procedures. Important as courts are, necessary as law is, litigation serves only a limited function. Room must be left for the workings of other conciliatory, mediating, and directive influences. (Page 56, 4th par.)

In **Williamson v. Lee Optical of Oklahoma,**[61] this Court, in an opinion by Justice Douglas speaking for eight members of the Court, upheld the constitutionality of a state statute dealing with the regulation of visual care. The Court held in part that:[62]

> We emphasize again what Chief Justice Waite said in **Munn v. Illinois**, 94 U. S. 113, 134, 24 L. ed. 77, 87, "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

In **Minersville School District v. Gobitis,**[63] this Court, in an opinion by Justice Frankfurter speaking for seven members of the Court, upheld, against constitutional attack, the power of public school authorities to require their pupils to salute the National Flag and to recite the pledge of allegiance thereto. The opinion of the Court concluded with the following admonition:[64]

> Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply cherished liberties. See **Missouri, K. & T. Ry. Co. v. May**, 194 U. S. 267, 270. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of

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[61] (1955), 348 U. S. 483, 99 L. ed. 563, 75 S. Ct. 461.

[62] Id., 348 U. S. 487, 3d par., 99 L. ed. 572, r. col., 2d par.

[63] (1940), 310 U. S. 586, 84 L. ed. 1375.

[64] Id., 310 U. S. 600, last par., 84 L. ed. 1382, l. col., last par.

foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.'

Another reflection of this rationale is strongly established in the equitable abstention cases. Compare: **Great Lakes Dredge & Dock Company v. Huffman** (1943), 319 U. S. 293, 87 L. ed. 1407, 63 S. Ct. 1070; **Martin v. Creasy** (1959), 360 U. S. 219, 3 L. ed. 2d 1186, 79 S. Ct. 1034; **Railroad Com. v. Pullman Co.**, 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643; **Harrison v. NAACP** (1959), 360 U. S. 167, 176, 2d par., 3 L. ed. 2d 1152, 1158, l. col., 2d par., 79 S. Ct. 1025; **Louisiana Power & Light Co. v. City of Thibodaux** (1959), 360 U. S. 25, 27, 1st par., 3 L. ed. 2d 1058, 1061, l. col., last par., 79 S. Ct. 1070, reh. den. (1959), 360 U. S. 940, 3 L. ed. 2d 1552, 79 S. Ct. 1442; **City of Meridian v. Southern Bell Tel. & Tel. Co.** (1959), 358 U. S. 639, 640, last par., 3 L. ed. 2d 562, 563, r. col., 2d par., 79 S. Ct. 455; **Albertson v. Millard** (1953), 345 U. S. 242, 245, 2d par., 97 L. ed. 983, 985, r. col., 3d par., 73 S. Ct. 600; **Burford v. Sun Oil Co.** (1943), 319 U. S. 315, 317, last par., 87 L. ed. 1424, 1426, l. col., 2d par., 63 S. Ct. 1098, reh. den. (1943), 320 U. S. 214, 87 L. ed. 1851, 63 S. Ct. 1442; **Beal v. Missouri Pacific Railroad Corp.** (1941), 312 U. S. 45, 50, 1st par., 85 L. ed. 577, 580, l. col., 1st par., 61 S. Ct. 418; and **Giovanni v. Camden Fire Insurance Assn.** (1935), 296 U. S. 64, 73, last par., 80 L. ed. 47, 53, r. col., last par., 56 S. Ct. 1. See also Justice Clark's concurring opinion in **Baker v. Carr**, 369 U. S. 258, last par.

These authorities reflect a sound and salutary policy derived from our federalism for the purpose of maintaining a balanced and harmonious relationship between

federal and state authority. The considerations that prevailed in these cases for avoiding the hazards of needless friction between federal and state authority are all the more appropriate in this case where there is a strong likelihood that the issues will be resolved by state legislative action.

II. Rigidity in Legislative Apportionment Should Be Avoided.

American democratic government is still in the process of evolution, the latest seismic development of which has been **Baker v. Carr.** The state legislatures have frequently been recognized in their role as "testing laboratories" of the governmental process, whereby innovation and experiment may be undertaken and later retained or rejected as the results dictate. Obviously, there is still much to be learned and many improvements possible in the application of the theory of representative government. Political scientists are presently studying systems of proportional representation,[65] cumulative voting,[66] limited vot-

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[65] A system of elections for legislative bodies in which an attempt is made to secure the representation of all parties or points of view in approximately the same proportions as their supporters exist in the district. Provision is made for several representatives per district, and for securing representation for minorities. The *Model State Constitution*, drafted in 1948 by the Committee on State Government of the National Municipal League, calls for a single legislative chamber elected by proportional representation from districts of compact and contiguous territory, "from each of which there shall be elected from three to seven members, in accordance with the population of the respective districts." See also: Phillip, *State and Local Government in America* (1954), p. 145, 3d par., p. 422, 4th par.; Brinkley and Moos, *A Grammar of American Politics* (2d ed.—1952), p. 964, last par.; and Clarence Gilbert Hoag and George Hallett, Jr., "Proportional Representation", New York, The Macmillan Company (1926).

[66] A system of representation in which the voter elects several members of a legislative body. He is given as many votes as there are seats to be filled, and can distribute his votes as he pleases, giving them all to one candidate if he so desires. See Phillip, *State and Local Government in America* (1954), p. 144, last par., p. 422, 3d par.; and George S. Clair, "Cumulative Voting", Urbana, University of Illinois Press (1960).

ing,[87] and weighted voting.[88] Furthermore, the Senate of New Hampshire is apportioned according to "direct taxes" paid. In commenting upon this unique formula of apportionment, Gordon E. Baker states that:[89]

> New Hampshire is the only state which has carried the principle of "no taxation without representation" to its ultimate conclusion. Its Senate districts are determined "by the proportion of direct taxes paid by the said districts." Districts were last established in 1915 and undoubtedly need revising, although curiously enough, the old tax apportionment is not too far removed from what a 1950 population standard would yield, and urban areas are not under-represented. The three largest cities, with 27 per cent of the state's population, elect an average of seven out of 24 senators. It is likely that taxes paid in any state generally correlate with the degree of urbanism.

The apportionment of the New Hampshire Senate has been recently upheld in **Levitt v. Maynard** (N. H. Supreme Ct.—1962), 182 A. 2d 897.

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[87] A system wherein a voter may not vote for the full number of legislative seats to be filled in a district, thereby assuring in most cases that the minority party will elect some representatives. Phillip, *State and Local Government in America* (1954), p. 145, 2d par.; p. 422, 2d par.

[88] A system in which a representative's vote is weighted according to the population of his district, number of actual votes cast for him, or other standard selected for weighting. See: Report, "Apportionment of State Legislatures", *Advisory Commission on Intergovernmental Relations* (Dec. 1962), p. 31, last par.; Gordon E. Baker, *State Constitutions: Reapportionment* (*National Municipal League*, 1960), pp. 33-34; Robert H. Engle, "Weighting Legislators' Votes to Equalize Representation," Western Political Quarterly, 12:442 (1959); Gus Tyler, "What is Representative Government," *The New Republic* (July 16, 1962), p. 18.

[89] Gordon E. Baker, "State Constitutions: Reapportionment" (1960), *National Municipal League*, p. 12, 4th par. See also: Report, "Apportionment of State Legislatures", *Advisory Commission on Intergovernmental Relations* (Dec. 1962), p. 33, last par.

These considerations coupled with the lessons of history demonstrate that the institutions of representative government will continue to be confronted with changing conditions, circumstances and problems. This fact of history argues strongly for the enunciation of fundamental governing standards in terms sufficiently broad to assure that the essence of any given standard will be preserved when applied in a climate of circumstances not anticipated at the moment of authorship. Absolute rigidity should be avoided. Yet, the Appellees in this case attempt to invoke a rigid interpretation of the Equal Protection Clause by attacking the requirement of at-large elections for senators from the multi-district counties, while conceding that such counties have been apportioned their fair share of senators according to population. This contention has no more merit than one seeking to force a state to adopt a system of proportional representation, cumulative voting or limited voting, in order to afford an opportunity for a minority party to elect its own representative. Obviously, such contentions are unsound today, and if adopted, could not withstand the test of time.

Even a cursory look across the Nation, reveals a vast variety of technique in the apportioning and districting of state, county and municipal legislative bodies. The increased emphasis and study now being given these matters promises a rapid proliferation of new techniques in this area. In the face of these present circumstances and impending changes, the courts cannot afford to shackle this development and experimentation with such rigidity as is advocated by the Appellees, but rather the courts should rely on broad formulas designed solely to prohibit unconstitutional debasement of voting strength.

A further example of this variety is found in **Blaikie v. Powers.**[70] The court held in this case that the New York

[70] (1963), 13 N. Y. 2d 134; 243 N. Y. S. 2d 185

City charter provision establishing limited voting by which each voter can vote for only one of the two candidates for office of councilman at-large from his borough, which is entitled to two councilmen at-large, does not violate the Equal Protection Clause. A dissenting opinion was filed in this case which relied in part on the "one man-one vote" formula stated in **Gray v. Sanders** (372 U. S. 368).

On appeal to this Court, the plaintiffs presented the following question:

> Does New York City Charter provision violate Fourteenth Amendment's Due Process and Equal Protection Clauses by disenfranchising electorate and diluting, restricting, and limiting their votes by denying them right to cast their ballots and have their votes counted for all elective offices, and by denying political organizations and their members right to nominate and elect candidates to fill all public offices (32 L. W. 3229).

Nevertheless, on January 13, 1964, this Court in a *per curiam* opinion granted the motion to dismiss for want of a substantial federal question. 32 L. W. 3254.

There is no invidious discrimination in this case because there is no dilution of voting strength. Each voter in Georgia has a substantially equal voice in the election of State senators irrespective of the fact that there is a variation in the structure of constituencies because of the employment of a single and multi-member districts. This case presents nothing more than a political debate which addresses itself to the legislature.

CONCLUSION.

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, and, hence, this Court should enter an order noting probable jurisdiction.

Respectfully submitted,

EUGENE COOK,
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PAUL RODGERS,
Assistant Attorney General,
Counsel for Appellant.

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132 Judicial Building,
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June 11, 1964.

APPENDIX.

United States District Court.

Northern District of Georgia,
Atlanta Division.

James W. Dorsey, Dan I. MacIntyre, III and James Edward Manget,
Plaintiffs,

v.

Ben W. Fortson, Jr., as Secretary of State of Georgia; Eugene Gunby, Ordinary, of Fulton County; and Katherine E. Mann, Ordinary, of DeKalb County,
Defendants.

Civil Action.
No. 8756.

Before Bell, Circuit Judge, and Hooper and Morgan, District Judges Per Curiam:

Plaintiffs, respectively, a registered voter from the 40th Senatorial District of Georgia, located in Fulton County; the State Senator who is also a registered voter from the same district; and a registered voter from the 42nd Senatorial District of Georgia, located in DeKalb County, seek relief, both declaratory and injunctive, from the force of the Georgia statute which requires countywide voting in the selection of state senators in counties having plural senatorial districts. Ga. Laws, Extraordinary Session, September-October, 1962, p. 7 et seq., § 9. The defendants are the election officials, respectively, for the State of Georgia, Fulton and DeKalb Counties.

The complaint is premised on a claim of violation of rights afforded under the equal protection clause of the Fourteenth Amendment. This rests on alleged discrimina-

tory treatment of plaintiffs in the debasement of their right to vote for a senator from their own district in that they must join with voters from other districts in the selection process, while voters residing in counties forming, either in whole or part, single senatorial districts are accorded the right to select their senators on a district-wide basis. They assert, for themselves and those in the same class, that the statutory effect is to place the selection of the senator from any district in a plural district county in the hands of voters other than those residing in the district.

The constitutionality of a state statute being involved in the context of a substantial question, a Three-Judge District Court was convened pursuant to 28 U. S. C. A., § 2281. **Gray v. Sanders**, 1963, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821. At the outset we hold that the court has jurisdiction, plaintiffs have standing to sue, and that a justiciable issue is presented. 28 U. S. C. A., §§ 1343 (3), 2201 and 2202; **Baker v. Carr**, 1962, 369 U. S. 186, 82 S. Ct. 601, 7 L. Ed. 2d 663; **Gray v. Sanders**, supra; **Wesberry v. Sanders**, United States Supreme Court, No. 22, Oct. Term, 1963, decided Feb. 17, 1964; and **Toombs v. Fortson**, N. D. Ga., 1962, 205 F. Supp. 248.

Plaintiffs as well as defendant Fortson have filed motions for summary judgment and we proceed to a consideration of the merits of those motions. While no findings of fact are necessary in the determination of such motions, **Hindes v. United States**, 5 Cir., 1964, 326 F. 2d 150, there is no dispute as to the facts, and they may be briefly stated as follows. We begin with the decision of this court in **Toombs v. Fortson**, supra, holding the General Assembly of Georgia to be malapportioned, and requiring that either the Senate or House of Representatives be apportioned on the basis of population so as to meet minimal constitutional standards of legislative apportionment.

The General Assembly thereafter convened and reapportioned the Senate on the basis of population. The then existing fifty four senatorial districts were reconstituted with the result that they ranged in population from 52,572 to 95,632. Some districts were located together with others in one county; others were made up of one whole county; while the remainder were comprised of two or more counties. For example, seven senatorial districts were located in Fulton County, three each in DeKalb and Chatham Counties, and two in each of the Counties of Bibb, Cobb, Muscogee and Richmond. The 12th Senatorial District is composed of Dougherty County alone, while the 52nd is composed only of Floyd County. The remainder may be described as plural county districts. The remaining districts are composed of from two to seven counties.

The apportionment of the House of Representatives was not changed. Its apportionment, as the court noted in **Toombs v. Fortson**, is based largely on geography, with representatives from the one hundred and three less populous counties of the state making a constitutional majority of the two hundred and five members of the House. At the same time, they represent only twenty two and one half percent of the population of the state. It was also noted that the eight most populous counties, although containing forty one percent of the population of the state, elect only twenty four of the two hundred and five representatives, or a little less than twelve percent of the total number. Each county has at least one representative while no county can have more than three.

The statute reapportioning the Senate, supra, in § 9 thereof, provides as follows:

> "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those

Senatorial Districts consisting of less than one county shall be elected by all voters of the county in which such Senatorial District is located."

It was the intent of the General Assembly as expressed in § 12 of this statute that the Senate be apportioned on population and the House on geography. At the same extraordinary session an amendment to the Constitution was proposed to provide that the Senate should consist of fifty four members and that the General Assembly should have authority to create, rearrange and change senatorial districts and to provide for the election of senators from each senatorial district or from several districts embraced within one county. This proposal was adopted by the people of Georgia in the general election of 1962, and by the people of all counties having plural districts save Bibb.

It is that portion of the quoted provision relating to elections in districts consisting of less than one county that plaintiffs seek to have declared unconstitutional as conflicting with the equal protection clause of the Fourteenth Amendment.[1]

They buttress their contention of invidious discrimination on the proposition that the essence of representative government is the selection of the representative by those whom he represents, citing **Toombs v. Fortson**, supra. They state that the representatives elected in the plural district counties are not elected by those whom they rep-

[1] Shortly after the enactment of this statute, and prior to the special election of senators under it, litigation ensued in the state court with respect to its constitutionality under the state constitution. That suit, which affected only those senatorial districts lying within the counties of Fulton and DeKalb, resulted in a decree requiring that the elections be held on a districtwide basis only, and this was the case. However, the senators from the districts lying within the other counties having plural districts were elected on a countywide basis. This was prior to the amendment to the state constitution.

resent since voters so situated do not have the opportunity of choosing their own senator, but must join with others to choose a group of senators. They assert, without contradiction, on the basis of the population of the various districts in Fulton County that only eighteen percent of the voters in the other six districts of that county could nullify the unanimous choice of the voters in the 34th Senatorial District and thrust a representative upon voters of that district for whom no one at all within the district had voted. Of course, this is carried to an extreme but it cannot be disputed that the selection of a senator from these districts is not within the control and province of the voters of the separate districts. By way of contrast, this is not the case with voters residing in districts not situated in plural district counties.

The Secretary of State urges that countywide voting is a rational and permissive classification in the interest of county government.[2] He points to the fact that plaintiffs have a political remedy and have not availed themselves of it even though one of the plaintiffs is a member of the State Senate. It is argued that there has been no dilution or debasement of the votes of plaintiffs since the whole of the fractional parts, i. e., their being able to vote for more than one senator, is equal to the vote of one residing in a district where he votes for one senator only.

We hold that the complaint is meritorious. There is no genuine issue as to any material fact and it appears that plaintiffs are entitled to judgment as a matter of law. Accordingly, the motion of plaintiffs for summary judgment will be granted, and that of the defendant Secretary of State denied.

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[2] Defendants Gunby and Mann did not join in the motion for summary judgment. They appeared at the hearing on the motions, through counsel, and did not dispute the facts, nor did they contest the position of the Secretary of State and plaintiffs that the case was ripe for summary judgment.

The Statute causes a clear difference in the treatment accorded voters in each of the two classes of senatorial districts. It is the same law applied differently to different persons. The voters select their own senator in one class of districts. In the other they do not. They must join with others in selecting a group of senators and their own choice of a senator may be nullified by what voters in other districts of the group desire. This difference is a discrimination as between voters in the two classes. The question is whether the discrimination reaches the point of being invidious for that is the type of discrimination that is proscribed by the Fourteenth Amendment. The Supreme Court in **Gray v. Sanders,** supra, in discussing the Georgia County Unit System where the state was divided into election units varying in population, with the result that voters, as between units, were treated differently to the extent that the votes of some were diluted, pointed out that the system violated the equal protection clause of the Fourteenth Amendment and said:

> ". . . there is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State."

We think the rationale of that case is applicable here by analogy. The unit system applied in statewide races and brought about a dilution of votes on the basis of homesite through the use of units. Here the dilution or debasement is of the right of some to choose their representative. It is discrimination in another form, but we think it necessarily follows that voters in some senatorial districts cannot be treated differently from voters in other senatorial districts. The statute here is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not. It is an invidious discrimination tested by any standard. Cf. tests laid down

by this court in **Toombs v. Fortson**, *supra*, and **Sanders v. Gray**, N. D. Ga., 1962, 203 F. Supp. 158. We agree that the essence of representative government is the choosing of a representative by those he represents. See memorandum opinion in **Toombs v. Fortson**, unpublished, dated September 5, 1962. And this principle must be applied in an even-handed manner. Its application may not be withheld from while at the same time being afforded others, once a political system such as a division of the state into senatorial districts is adopted.

It is contended that the character of the discrimination can be justified on the basis that harmony between senators is required so that the county in which they reside may be better represented. This is said to be a reasonable classification. See **McGowan v. State of Maryland**, 1960, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393, on the subject of permissible classifications by states. The answer to this is that the Senate is to represent population and not geography. That was the intent of the General Assembly in reapportioning. Protecting the interest of counties may be a high motive but it cannot be done at the expense of the voters of the populous counties as is the case here.

With respect to the fact that plaintiffs have not sought to use their available political remedy, our attention is called to the case of **Spahos v. Mayor and Councilmen of the Town of Savannah Beach**, S. D. Ga., 1962, 207 F. Supp. 688, affirmed, 1962, 371 U. S. 206, 83 S. Ct. 304, 9 L. Ed. 2d 269. There the court in testing for invidiousness did determine that plaintiffs had a political remedy available as distinguished from the stranglehold situation present in **Baker v. Carr**, supra, but there was another overriding consideration in dismissing the complaint. That was that the classification of voters being attacked was found to have a reasonable basis. This is not the case here. Moreover, the teaching of **Wesberry v. Sanders**, supra, decided

thereafter by the Supreme Court, is that available political remedies, as was the case with both state and federal legislative remedies available, is not a bar or even a deterrent to an adjudication or declaration of constitutional rights. It may be the subject of consideration in the determination of the relief to be thereafter accorded, but not in the declaration of rights.

In sum, the Senate was apportioned to population. The state through the statute in question and the medium of constitutional amendment, divided the state into population districts. Having done so, and the circumstances as they relate to voters residing in each being the same; they are entitled to equal treatment. For these reasons, we hold that portion of the statute in question here, to-wit, the requirement "that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all voters of the county in which such Senatorial District is located" to be unconstitutional on the basis of being violative of the equal protection clause of the Fourteenth Amendment. It is therefore null and void. This will leave that portion of the statute in force which provides that each senator shall be elected by the voters of the district of which he is a resident.

The injunctive relief sought is denied. There is no indication that defendants will not follow the law as declared. In fact, plaintiffs stated in open court that this was the case and that they believed injunctive relief to be unnecessary in the event the court voided the statute. These respected and responsible officials are simply caught up in the ferment of change stemming from the recent concept of applying federal constitutional standards to the political process through the use of the judicial process. **Baker v. Carr**, supra, and its progeny. We think that a declaration of rights under the circumstances, with the attendant striking of the infected portion of the statute, will suffice.

Plaintiffs may submit an appropriate order after due notice to counsel for defendants.

This the 27 day of March, 1964.

/s/ Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge.

/s/ Frank A. Hooper,
Frank A. Hooper,
United States District Judge.

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

In the United States District Court for the
Northern District of Georgia,
Atlanta Division.

James W. Dorsey, Dan I. MacIntyre, III, and James Edward Manget, Plaintiffs,

vs.

Ben W. Fortson, Jr., as Secretary of State of Georgia; Eugene Gunby, Ordinary of Fulton County, and Katherine E. Mann, Ordinary of DeKalb County, Defendants.

Civil Action.
No. 8756.

Final Judgment of the Court.

The above and foregoing matter having been heard by a Three-Judge Court as an action for declaratory judgment and on motions for summary judgment filed by the plaintiffs and by the defendant, Ben W. Fortson, Jr., and the matter properly being before the Court in accordance

with Rules 56 and 57 of the Rules of Civil Procedure, and the Court having entered an opinion, dated March 27, 1964, in favor of the plaintiffs, Now, Therefore,

It Is Hereby Ordered, Adjudged, Decreed and Declared that so much of the statute here under consideration, to-wit: that part of Section 9 of the Georgia Laws, Extraordinary Session, September-October, 1962, at page 7 et seq., that provides "except that the senators from those senatorial districts consisting of less than one county shall be elected by all voters of the county in which such senatorial district is located" is unconstitutional, unenforceable, null and void, as being in violation of the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States.

It Is Further Ordered and Adjudged that the Motion for Summary Judgment of the defendant, Fortson, is overruled and that the Motion for Summary Judgment of the plaintiffs is granted.

It Is Further Ordered and Declared that each and every senator to the State Legislature for the State of Georgia shall be elected by the voters of his own district, without regard to whether said senatorial district comprises an entire county or more than one county, or less than one county.

This 6th day of April, 1964.

s/ Griffin B. Bell,
Judge, United States Circuit Court
Sitting as Senior Judge of a Three
Judge Court for the Northern District of Georgia.

s/ Frank A. Hooper,
Judge, United States District Court.

s/ Lewis R. Morgan,
Judge, United States District Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Number [redacted] 178

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,

Appellant,

vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,

Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

MOTION TO AFFIRM

EDWIN F. HUNT
501 Bank of Georgia Building
Atlanta, Georgia

WILLIAM C. O'KELLEY
1501 Bank of Georgia Building
Atlanta, Georgia

CHARLES A. MOYE, JR.
Citizens & Southern National Bank Building
Atlanta, Georgia

Counsel for Appellees

July 9, 1964

IN THE

Supreme Court of the United States

NO. 1213, OCTOBER TERM, 1964.

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,

Appellant,

vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,

Appellees.

MOTION TO AFFIRM

Appellees, pursuant to rule 16 of the Revised Rules, of the Supreme Court of the United States, move that the final judgment and decree of the Three Judge District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on April 6, 1964, by a district court of three judges specially constituted pursuant to 28 U.S.C. §2281 granting appellees' motion for summary judgment and further holding that the statute of the State of Georgia attacked by appellees was unconstitutional, null and void as being in violation of the Equal Protection clause

of the Fourteenth Amendment and decreeing that each and every senator to the State Legislature for the State of Georgia shall be elected by the voters of his own district without regard to whether said senatorial district comprises an entire county or more than one county or less than one county.

The original suit was brought by three registered voters of the Atlanta metropolitan area in the United States District Court for the Northern District of Georgia against the Secretary of the State of Georgia and two other election officials. The plaintiffs below sought invalidation of a statute of the State of Georgia, which required that the State senators from senatorial districts consisting of less than one county had to be elected by all the voters of the county in which such senatorial district was located. Plaintiffs below also sought an injunction against the defendants to prevent them from applying the statute in question to elections for the State Senate.

ARGUMENT

The decision of the Court below is plainly correct. The statute under attack[1] presents the clearest example of different application of a law to different persons imaginable. In senatorial districts composed of one or more counties, the voters elect their own senator. In

[1] Section 9 of the Senatorial Reapportionment Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides in pertinent part that:

> Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located.

senatorial districts composed of less than one county (multi-district counties), the voters must join with voters from foreign districts to select a group of senators to represent the county as a whole.

This Court held in *Wesberry* vs. *Sanders*, 376 U. S. 1:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

This Court reiterated this particular principle as recently as June 15, 1964, in *Reynolds* vs. *Sims*, (Numbers 23, 27 and 41, October Term 1963), and in that case this Court also said:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."

Perhaps the most significant language ever used by this Court in addressing itself to the issue presently under consideration is that language found at page 379 of *Gray* vs. *Sanders*:[2]

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, whatever

[2] 372 U.S. 368.

> their occupation, whatever their income, and wherever their home may be in the geographical unit. This is required by the equal protection clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates underlies many of our decisions."

This Court has held on so many occasions that the Constitution of the United States protects the right of all qualified citizens to vote in state, as well as federal, elections that the cases hardly needs citation. Division II of the opinion in *Reynolds* vs. *Sims* provides a recent, thorough and convenient review of such decisions as Ex parte Yarbrough 110 U. S. 651, *United States* vs. *Mosely* 238 U. S. 383, and *South* vs. *Peters* 339 U. S. 276, 279, where it was held:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government, and the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The classic discussions of debasement is of course to be found in *Baker* vs. *Carr* 369 U. S. 186. Nor can discrimination be practiced merely by fabricating a sophisticated rather than a simple-minded discriminatory scheme. *Lane* v. *Wilson* 307 U. S. 268, 275 *Gomillion* v. *Lightfoot* 364 U. S. 339, 342 and Wesberry, supra.

CONCLUSION

The rationale of the decision below was that the essence of representative government is the choosing of a representative by those he represents. This rationale is surely demanded by the Constitution of the United States and the decisions of this Court in *Gray*, *Baker*, *Wesberry* and *Reynolds* to mention but a few. To reverse the decision of the Court below, as the appellant urges, would be to take a backward step in the area of protection of the right to vote under the Equal Protection Clause of the Fourteenth Amendment. Appellant has shown no valid reason why different categories of voters receive different treatment with regard to their vote for their State Senator and appellees respectfully submit that there is no substantial question presented for decision by this Court and the judgment and decree of the District Court should be affirmed.

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CERTIFICATE OF SERVICE

I, CHARLES A. MOYE, JR., one of the attorneys for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of July, 1964, I served a copy of the foregoing Motion to Affirm on the Appellant by mailing a copy in a duly addressed envelope with postage prepaid to his Counsel of Record, The Honorable Eugene Cook, Attorney General of the State of Georgia, 132 Judicial Building, 40 Capitol Square, Atlanta, Georgia.

CHARLE A. MOYE, JR.
Of Counsel for Appellees

IN THE

Supreme Court of the United States

October Term, 1964

Number 178

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,

Appellant,

vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,

Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION FOR ADVANCEMENT OF CASE ON CALENDAR

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November 6, 1964

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MOTION FOR ADVANCEMENT OF CASE ON CALENDAR

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the parties to the above entitled cause, and pursuant to Rule 43 (4) of the Revised Rules of the Court, move the Court to issue an order placing this

cause on the calendar for argument in December 1964, and as ground therefor, show that:

1.

The General Assembly of the State of Georgia will convene in regular session on January 11, 1965, and the parties believe that it will adjourn sine die on or about March 12, 1965.[1]

2.

During such regular session, the General Assembly is under a duty to reapportion its House of Representatives according to population as required by the orders of the United States District Court for the Northern District of Georgia in Civil Action No. 7883, *Toombs* v. *Fortson, et al.*, rendered on June 19, 24 and 30, and November 3, 1964.

3.

The State Senate was reapportioned according to population by an Act, approved October 5, 1962,[2] as earlier required by the District Court in *Toombs* v. *Fortson*.[3] The Act divided the fifty-four member Senate into fifty-four districts of substantially equal population, twenty-one of which are wholly contained within the State's seven most populous counties. The Act provides that "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those Senatorial Districts consisting of less than one county shall be

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[1] See Art. III, Sec. IV, Par. III, State Constitution; Ga. Code Ann., Sec. 2-1603.

[2] Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 7, at pp. 14-31; Ga. Code Ann., Sec. 47-102.

[3] (D.C. - N.D. Ga. - 1962) 205 F. Supp. 248.

elected by all the voters of the county in which such Senatorial District is located."[4] The Appellees in this cause challenged the validity of such Act, insofar as it requires the county-at-large election of State senators in the seven most populous counties, as being in violation of the Fourteenth Amendment to the Federal Constitution. The District Court below rendered judgment in favor of the Appellees requiring the election of these senators within their respective districts, and this judgment is now before the Court for review on direct appeal.

4.

The parties believe that the determination of the issue presented in the above entitled cause by the Court prior to March 12, 1965, may be of value to the General Assembly in the performance of its duty to reapportion the House of Representatives according to population. Consequently, the parties seek to have this cause argued in December 1964 in order to enhance the possibility that the Court may render decision therein prior to March 12, 1965.

5.

In order to facilitate oral argument of this cause in December 1964, counsel for the respective parties hereby stipulate that the Appellant will file his brief on the merits with the Court on or before November 10, 1964, and that the Appellees will file their brief on the merits with the Court within twenty days after their counsel are served with copies of the Appellant's brief on the merits.

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[4] Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102.

WHEREFORE, the parties move the Court to issue an order placing this cause on the calendar for argument during December 1964.

Respectfully submitted.

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November 6, 1964

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

Number 178.

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vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

BRIEF FOR THE APPELLANT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

The opinion of the Three-Judge District Court (R. 40-47) is reported at 228 F. Supp. 259. The final judgment of the District Court (R. 47-48) is unreported.

JURISDICTION.

This is a suit brought under 28 U. S. C. 1343 and 2201 by three registered voters of the Atlanta metropolitan area in the United States District Court for the Northern District of Georgia against the Secretary of State of Georgia and two local election officials seeking to invalidate, on Federal constitutional grounds, a State law requiring the county-at-large election of State senators in counties apportioned plural senatorial representation, and to enjoin the defendants from complying with the provisions of the challenged law. Jurisdiction of the suit is vested in the Three-Judge District Court by 28 U. S. C. 2281.

In an opinion rendered on March 27, 1964, and in final judgment rendered on April 6, 1964, the Three-Judge District Court granted the declaratory relief sought by the plaintiffs but denied the injunctive relief on the ground that there "is no indication that defendants will not follow the law as declared" (R. 46). On April 14, 1964, the notice of appeal to this Court from such opinion and judgment was filed with the Clerk of the District Court (R. 49).

The jurisdiction of this Court to review by direct appeal such opinion and final judgment is conferred by 28 U. S. C., Sections 1253 and 2101 (b).

The following cases sustain the jurisdiction of this Court to review such opinion and judgment on direct appeal in this case: **Baker v. Carr** (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 691; **Gray v. Sanders** (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801; and **Wesberry v. Sanders** (1964), 376 U. S. 1, 11 L. ed. 2d 481, 84 S. Ct. 526.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 9 of the Senatorial Reapportionment Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides in pertinent part that:

> Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, **except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located.** (The emphasis indicates the language invalidated by the District Court.)

Paragraph I of Section II of Article III of the Constitution of the State of Georgia (Ga. Code Ann., Sec. 2-1401), as ratified by the people on November 6, 1962, provides that:

> (a) Number and Apportionment of Senators. The Senate shall consist of fifty-four (54) members. The General Assembly shall have authority to create, rearrange and change Senatorial Districts and to provide for the election of senators from each Senatorial District, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable.
>
> (b) Interim Ratification. An Act providing for the reapportionment of the State Senate, enacted by the General Assembly at the extraordinary Session which convened on September 27, 1962, which Act made special provision for the election of Senators for the 1963-64 term and all elections held thereunder, are hereby ratified.

QUESTIONS PRESENTED.

Whether a state legislature, containing fifty-four senators, may divide a state into fifty-four senatorial districts according to population, some districts containing one or more counties and some counties containing two or more districts, and require that the senators from the districts containing one or more counties be elected by the voters within their respective districts, while also requiring that the senators from the multi-district counties be elected by the voters within their respective counties.

Whether that part of Section 9 of the Senatorial Reapportionment Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Act., 1962, Extra. Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides that "the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located", denies to the Appellees the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

STATEMENT.

This is an appeal from the final judgment of a Three-Judge District Court for the Northern District of Georgia granting summary judgment against the Secretary of State of the State of Georgia and two local election officials in an action brought by three registered voters to invalidate, on Federal constitutional grounds, a State law requiring the county-at-large election of State senators in counties apportioned plural senatorial representation, and to enjoin such officials from complying with the provisions of the challenged law. The action originated out of the following circumstances.

In **Toombs v. Fortson**,[1] a three judge district court determined on May 25, 1962, that so long as the General Assembly of Georgia "does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements."[2]

On September 14, 1962, the Governor of Georgia issued his Proclamation[3] convening the General Assembly in extraordinary session on September 27, 1962, for the purpose, *inter alia*, of considering and enacting laws relating to the reapportionment of the Senate within the requirements of the **Toombs** case. Upon convening, the General Assembly expeditiously went about the business of considering the reconstitution of the Senate, which culminated on October 5, 1962, in the enactment into law of the State Senatorial Reapportionment Act[4] apportioning the membership of the Senate entirely on a population basis as required by the **Toombs** case.

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[1] (D. C.—N. D. Ga.—1962), 205 F. Supp. 248.

[2] Id., p. 257, l. col. (5). This determination was reiterated in a supplemental decision, dated September 5, 1962, which is unreported.

[3] Ga. Laws, Sept.-Oct., 1962, Extra. Sess.; pp. 3-5.

[4] Id., pp. 7-31; Ga. Code Ann., Sec. 47-102.

The Act divided the State into fifty-four senatorial districts, twenty-one of which are wholly contained within the State's seven most populous counties.[5] The Act requires that "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located."[6]

Also during this extraordinary session, the General Assembly, by the requisite two-thirds constitutional majority in each House, adopted a Resolution[7] proposing the following Amendment to the State Constitution:

> Section 1. Article III, Section II, Paragraph I of the Constitution is hereby amended by striking said Paragraph in its entirety and inserting in lieu thereof the following:
>
> "Paragraph 1. (a) Number and Apportionment of Senators—The Senate shall consist of fifty-four (54) members. The General Assembly shall have authority to create, rearrange and change Senatorial Districts and to provide for the election of senators from each Senatorial District, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable.
>
> "(b) Interim Ratification—an Act providing for the reapportionment of the State Senate, enacted by the General Assembly at the extraordinary Session which convened on September 27, 1962, which Act

[5] The map on page 25 of the Record shows the senatorial districts and the population per district. The map's introduction into evidence is shown by the Record at pages 33-34.

[6] Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 30, 1st par.; Ga. Code Ann., Sec. 47-102.

[7] Ga. Laws, Sept.-Oct., 1962, Extra. Sess., pp. 51-52. Approved October 8, 1962.

made special provision for the election of Senators for the 1963-64 term and all elections held thereunder, are hereby ratified."

Pursuant to this Resolution, the ballots and ballot labels used in the General Election held on November 6, 1962, contained the question as to whether the proposed Amendment should be ratified. At the Election, the people ratified such Amendment by a vote of 119,502 for and 75,598 against.[8] The Amendment carried in each of the multi-senatorial district counties except Bibb (R. 17-20; D. Ex. B; R. 31, 33, 34).

On January 24, 1964, State Senator MacIntyre of the Fortieth Senatorial District (contained within Fulton County) and two registered voters of Fulton and DeKalb Counties, pursuant to 28 U. S. C. 1343 and 2201, filed a complaint in the United States District Court for the Northern District of Georgia (R. 1). This complaint alleged the adoption of the above statutory and constitutional provisions and sought the convocation of a three-judge district court pursuant to 28 U. S. C. 2281 and 2284, and asked that such court enter a judgment: declaring that the State Law requiring the county-at-large election of State senators in the seven counties apportioned plural senatorial representation to be in violation of the Fourteenth Amendment to the Federal Constitution; and requiring that the senators from the seven multi-district counties be elected only by the voters of their respective districts; and enjoining the Appellant and the Ordinaries (election officials) of Fulton and DeKalb Counties from complying with the provisions of such State law (R. 5-6).

On February 18, 1964, the Appellant filed his answer and defense admitting the allegations of fact contained in the

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[8] Ga. Laws, 1963, pp. 844-847. See also the Affidavit of the Secretary of State (R. 11-16; D. Ex. A; R. 31, 33, 34). The Amendment is unofficially reported in Ga. Code Ann., Sec. 2-1401.

complaint, but denying that the Appellees were entitled to any relief (R. 8), and on March 6, 1964, he moved for the entry of summary judgment dismissing the action (R. 10). A cross motion for summary judgment was filed by the Appellees on March 13, 1964 (R. 26).

After oral argument, the District Court, on March 27, 1964, granted summary judgment in favor of the Appellees.[9] In its opinion, the Court concisely stated the competing contentions of the parties in the following terms (R. 43):

> They (Appellees) state that the representatives elected in the plural district counties are not elected by those whom they represent since voters so situated do not have the opportunity of choosing their own senator, but must join with others to choose a group of senators. They assert, without contradiction, on the basis of the population of the various districts in Fulton County that only eighteen percent of the voters in the other six districts of that county could nullify the unanimous choice of the voters in the 34th Senatorial District and thrust a representative upon voters of that district for whom no one at all within the district had voted. Of course, this is carried to an extreme but it cannot be disputed that the selection of a senator from these districts is not within the control and province of the voters of the separate districts. By way of contrast, this is not the case with voters residing in districts not situated in plural district counties.
>
> The Secretary of State urges that county-wide voting is a rational and permissive classification in the interest of county government. He points to the fact that plaintiffs have a political remedy and have not availed themselves of it even though one of the plain-

[9] (D. C.—N. D. Ga.—1964), 228 F. Supp. 259.

tiffs is a member of the State Senate. It is argued that there has been no dilution or debasement of the votes of plaintiffs since the whole of the fractional parts, i. e., their being able to vote for more than one senator, is equal to the vote of one residing in a district where he votes for one senator only.

The District Court then drew an analogy from **Gray v. Sanders**[10] and determined that the challenged law created an invidious discrimination (R. 44). On April 6, 1964, the Court entered final judgment in accordance with its opinion (R. 47).

One of the curious aspects of this case is the fact that the complaint was filed during the early part of the 1964 Regular Session of the General Assembly,[11] and that the Appellees, one of whom is a State Senator, or any other member of the General Assembly, have made no effort to pass legislation at either the 1963 or 1964 Regular Sessions of the General Assembly to amend the State Senatorial Reapportionment Act so as to require senators in multi-district counties to be elected within their respective districts (R. 21-24; D. Exs. C, D; R. 31, 33, 34). The chance of such legislation being adopted would appear to be quite good because it would only affect seven counties and there apparently would be no urban-rural conflict over such an amendment. This likelihood was recognized by Circuit Judge Bell at the hearing held before the District Court on March 17, 1964. The Judge stated that "I have no doubt this statute would be changed in the Legislature if somebody would get over there and make some effort to do it" (R. 32).

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[10] (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801.

[11] The General Assembly had convened in regular session on January 13, 1964, pursuant to Art. III, Sec. IV, Par. III of the St. Const. (Ga. Code Ann., Sec. 2-1603).

SUMMARY OF ARGUMENT.

The Senatorial Reapportionment Act has divided the State into fifty-four Senatorial districts and thereby has allotted seven Senators to Fulton County, three Senators to each of Chatham and DeKalb Counties, and two Senators to each of Bibb, Cobb, Muscogee and Richmond Counties, and one Senator to each of the other thirty-three districts which are composed of one or more counties. The relief sought in the complaint affects only the seven named counties which are the most populous, and is predicated upon the assumption that each of these counties has been apportioned the full number of senators required by its population. Consequently, all parties agree that it is legal for each district to elect one senator. The sole issue presented by this case is whether it is legal for the senators from the multi-district counties to be elected county-at-large.

The present apportionment of both Houses of the General Assembly is predicated upon the political autonomy of the counties. The people of Georgia through constitutional ratification have chosen to regard the county as an indivisible electoral unit in the election of the membership of the General Assembly. Consequently, the senators from those counties entitled to plural senatorial representation are elected county-at-large. The objective of such an at-large election is rational and intelligible because it stimulates unity and harmony within the senatorial delegation in seeking the attainment of the political goals of the county electorate. This position does not rest upon any theory of county sovereignty, or upon any analogy between county and state, but merely upon the fact that the operation of county government over a period of years has produced an electoral homogeneity worthy of reflection in legislative representation.

I.

The challenged method of electing senators in this case does not produce any mathematical devaluation of the vote. For example, let us compare the status of a Fulton County voter with one who resides in a rural district electing a single senator. The Fulton voter is a part of an electorate which is approximately seven times larger than the electorate of which the rural voter is a part, however, the Fulton County voter has the right to vote for seven senators whereas the rural voter may only vote for one. Theoretically, the rural voter would have a greater influence upon his single senator than the Fulton voter would have upon any one of his seven senators, but the latter's aggregate influence upon each of his senators would equal the rural voter's influence upon his single senator. In other words, the Fulton voter has an advantage in being able to vote for seven senators, but this advantage is offset by his being a part of the large electorate necessary to support the representation of seven senators.

II.

The State Senatorial Reapportionment Act has divided the State into fifty-four senatorial districts and, by virtue of requiring at-large elections in multi-district counties, into forty senatorial constituencies. In effect, the Bill divided the State into thirty-three single-member districts and seven multi-member districts. This districting results in the creation of **two** differences in treatment among the voters of the State in the election of senators. **First**, voters in the more populous districts have the opportunity of electing plural senatorial representation, while the voters in any other district may only elect the single senator apportioned to them. **Second**, the voters of a district within a county having plural senatorial representation are not permitted to wholly elect a senator to

represent only their district, but are required to join with the voters of the other districts within the county in electing the senators assigned to the county.

As to the first difference, it is clear from an examination of legislative apportionment across the nation that the practice of combining both single and multi-member districts, or multi-member districts containing varying numbers of members, in structuring a legislative chamber, is and has been a widely prevalent practice among the States. Consequently, it is significant that none of the legislative apportionment cases decided by this Court have condemned the employment of multi-member districts in such fashions. Rather, the attention of this Court has been directed toward one basic question—whether the legislative apportionment under consideration reflects an irrational debasement of voting strength.

Furthermore, the legitimacy of combining single and multi-member districts was recognized by this Court in **Reynolds v. Sims**, 377 U. S. 533, wherein it is stated that "One body could be composed of single-member districts while the other could have at least some multi-member districts."

In view of these authorities, it is clear that the combination of single and multi-member districts within a legislative chamber does not constitute invidious discrimination **unless** it results in an unjustifiable population disparity.

Turning to the second difference referred to above, this Court may judicially know that the City of Atlanta is divided into eight wards with two aldermen from each, who are elected city-at-large, and that this electoral practice epitomizes a widely prevalent method of electing municipal and county legislative bodies throughout the Nation. Obviously, this method of electing representatives does not constitute invidios discrimination unless it should produce population disparities in voting strength.

One of the reasons frequently attributed for Atlanta's progressive and moderate government is the fact that its aldermen are elected at-large with the result that they are permitted to consider measures in the light of the interests of the City as a whole, instead of being limited by parochial viewpoints engendered by ward election. If such a method of electing aldermen is beneficial for the City of Atlanta, then why would not the same method of electing senators be beneficial for Fulton County?

If such at-large elections were determined to be unconstitutional, then it would not only invalidate a technique of apportionment frequently built into state, county and municipal legislatures, but would also deprive the courts of one of their most effective remedies in eradicating legislative malapportionments. For example, suppose the legislature had required that Fulton's senators run only within their districts and had then drawn these district lines in such a manner as to create egregious population disparities among the districts. In eliminating this malapportionment, would it not be much better for the court to order a county-at-large election for the senators, rather than to undertake the making of the classic legislative judgments involved in drawing district lines? Obviously, such lines could not be drawn without affecting partisan interests.

In our consideration of these two differences (single and multi-member districts and county-at-large elections) we have found that both are equally inoffensive to constitutional standards. Consequently, why does the joining of these two differences in structuring the Georgia Senate produce invidious discrimination?

III.

This Court has indicated in **Baker v. Carr**, 369 U. S. 186, **Reynolds v. Sims**, 377 U. S. 533, and other legislative apportionment cases that the traditional tests under the Equal Protection Clause are the ones to be applied in

determining the validity of state legislative apportionments. Obviously, this Court did not attempt to create any new judicial standards for courts to apply when faced with a claim of arbitrary state action in the field of legislative apportionment.

These cases taken in conjunction with **Norvell v. Illinois**, 373 U. S. 420, and **McGowan v. Maryland**, 366 U. S. 420, unequivocally demonstrate that a state is to be allowed every reasonable latitude in the field of legislative apportionment, and any device therein will not be set aside if any state of facts reasonably may be conceived to justify it.

IV.

Historically, the counties of Georgia are the basic units of representation and local government. Georgia, since earliest times, has consistently emphasized county government and the county unitary approach. A county is a political subdivision of the State, created for administrative purposes, is representative of the sovereignty of the State and auxiliary to it. Its functions are of a public nature; it is political in character, and constitutes the machinery by and through which many of the powers of the State are exercised. Consequently, the operation of county government over a period of years produces a degree of solidarity from economic, social and political causes. In other words, a county generally reflects a fairly solid unit of political thinking.

In **Reynolds v. Sims**, supra, this Court approved the practice of drawing state legislative districts according to county boundaries "so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way".

These considerations clearly demonstrate that requiring at-large elections in multi-district counties is a rational

and reasonable legislative objective which is not precluded by the Equal Protection Clause. Furthermore, the rationality of individual county representation is particularly apparent in Georgia where legislative action applicable only to one or more particular counties is traditional. The question before the Court is not whether the requirement of county-at-large elections is wise or unwise, but simply whether it is invidiously discriminatory. Manifestly, the requirement reflects a rational policy fully consistent with the principles of the Equal Protection Clause. The Court should be loath to discard an operative system of government on the basis of the vague and untenable contentions of invidious discrimination advocated by the appellees.

V.

American democratic government is still in the process of evolution, the latest seismic developments of which have been **Baker v. Carr** and **Reynolds v. Sims**. The state legislatures have frequently been recognized in their role as "testing laboratories" of the governmental process, whereby innovation and experiment may be undertaken and later retained or rejected as the results dictate. Obviously, there is still much to be learned and many improvements possible in the application of the theory of representative government. Political scientists are presently studying systems of proportional representation, cumulative voting, limited voting, and weighted voting.

These considerations coupled with the lessons of history demonstrate that the institutions of representative government will continue to be confronted with changing conditions, circumstances and problems. This fact of history argues strongly for the enunciation of fundamental governing standards in terms sufficiently broad to assure that the essence of any given standard will be preserved when applied in a climate of circumstances not anticipated at

the moment of authorship. Consequently, absolute rigidity should be avoided in order to permit the free development of fairer and more equitable voting systems and legislative apportionments. Yet, the Appellees in this case attempt to invoke a rigid interpretation of the Equal Protection Clause by attacking the requirement of at-large elections for senators from the multi-district counties, while conceding that such counties have been apportioned their fair share of senators according to population. This contention has no more merit than one seeking to force a state to adopt a system of proportional representation, cumulative voting or limited voting, in order to afford an opportunity for a minority party to elect its own representative. Obviously, such contentions are unsound today, and if adopted, could not withstand the test of time.

Even a cursory look across the Nation, reveals a vast variety of technique in the apportioning and districting of state, county and municipal legislative bodies. The increased emphasis and study now being given these matters promises a rapid proliferation of new techniques in this area. In the face of these present circumstances and impending changes, the courts cannot afford to shackle this development and experimentation with such rigidity as is advocated by the Appellees, but rather the courts should rely on broad formulas designed solely to secure substantial equality of voting strength within a rational framework of legislative apportionment.

The Appellant believes that there is no invidious discrimination in this case because there is no dilution of voting strength. Each voter in Georgia has a substantially equal voice in the election of State senators irrespective of the fact that there is a variation in the structure of constituencies because of the employment of single and multi-member districts. Consequently, this case presents nothing more than a political debate which addresses itself to the legislature and to the people of Georgia.

ARGUMENT.

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED BECAUSE THE COUNTY-AT-LARGE ELECTION OF STATE SENATORS IN COUNTIES APPORTIONED PLURAL SENATORIAL REPRESENTATION IS A RATIONAL AND INTELLIGIBLE REQUIREMENT WHICH DOES NOT DEBASE THE VALUE OF ANY VOTE.

The State Senatorial Reapportionment Act has allotted the voters of Fulton County seven Senators, the voters of Chatham and DeKalb Counties three Senators each, and the voters of Bibb, Cobb, Muscogee and Richmond Counties two each. The relief sought in the complaint affects only these seven most populous counties and is predicated upon the assumption that each of these counties has been apportioned the full number of senators required by its population. Consequently, all parties agree that it is legal for each district to elect one senator. The sole issue presented by this case is whether it is legal for the senators from the multi-district counties to be elected county-at-large.

The present apportionment of both Houses of the General Assembly is predicated upon the political autonomy of the counties. The people of Georgia through constitutional ratification have chosen to regard the county as an indivisible electoral unit in the election of the membership of the General Assembly. Consequently, the senators from those counties entitled to plural senatorial representation are elected county-at-large. The objective of such an at-large election is rational and intelligible because it stimulates unity and harmony within the senatorial delegation in seeking the attainment of the political goals of the county electorate. This position does not rest upon any theory of county sovereignty, or upon any analogy

between county and state, but merely upon the fact that the operation of county government over a period of years has produced an electoral homogeneity worthy of reflection in legislative representation.

I.

No Mathematical Devaluation of the Vote.

The challenged method of electing senators in this case does not produce any mathematical devaluation of the vote. For example, let us compare the status of a Fulton County voter with one who resides in a rural district electing a single senator. The Fulton voter is a part of an electorate which is approximately seven times larger than the electorate of which the rural voter is a part, however, the Fulton County voter has the right to vote for seven senators whereas the rural voter may only vote for one. Theoretically, the rural voter would have a greater influence upon his single senator than the Fulton voter would have upon any one of his seven senators, but the latter's aggregate influence upon each of his senators would equal the rural voter's influence upon his single senator. In other words, the Fulton voter has an advantage in being able to vote for seven senators, but this advantage is offset by his being a part of the large electorate necessary to support the representation of seven senators.

Another approach is helpful in analyzing this matter. In **Baker v. Carr**,[12] **Gray v. Sanders**,[13] **Wesberry v. Sanders**,[14] and **Reynolds v. Sims**,[15] this Court has espoused its "one man-one vote" formula of political equality. The

[12] (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 691.

[13] (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801.

[14] (1964), 376 U. S. 1, 11 L. ed. 2d 481, 84 S. Ct. 526.

[15] (1964), 377 U. S. 533, 12 L. ed. 2d 506, 84 S. Ct. 1362.

most exact proportionate representation under this formula would be secured by making a single district of the State and electing all of the senators by the people at-large. Each voter would then have his absolute and equal weight with every other voter in selecting the senators. This arrangement would be legal although the electorate would be greatly inconvenienced in attempting to intelligently fill fifty-four Senate seats.[16] However, there would be no doubt that the "one man-one vote" formula had been applied with mathematical exactitude.

It is generally recognized that a state may apportion its legislative houses according to population by dividing the state into districts containing substantially equal populations and that such an apportionment would not violate the Equal Protection Clause. However, due to the never-ceasing occurrence of births, deaths and migrations, it is impossible to divide the State into fifty-four districts containing precisely equal populations. Therefore, in districting we are forced to accept the imprecise standard of substantial equality of population among the districts because no two districts could be or could long remain exactly equal to each other in population. Therefore, the voters in the lesser populated districts would have a slight, though permissible, political advantage over those voters in the more populous districts. Obviously, some discrimination is always inherent in districting.

In carrying this thinking a step further, let us consider the Fulton County Districts. This Court may judicially know that according to the 1960 Federal Census the Fulton

[16] This Court has decided several cases involving the use of at-large elections without questioning their constitutionality. See: *Smiley v. Holm* (1932), 285 U. S. 355; *Carroll v. Becker* (1932), 285 U. S. 380; and *Koenig v. Flynn* (1932), 285 U. S. 375. Compare: *People ex rel. Daniels v. Carpentier* (1964), ... Ill. App. 2d ..., 198 N. E. 2d 514; and *Brown v. Saunders* (1932), 159 Va. 28, 166 S. E. 105.

Districts range in population from a low of 74,834 in the 40th (Appellee MacIntyre's) to a high of 82,888 in the 35th (R. 25; D. Ex. E; R. 33-34). Consequently, if senators were elected only in their districts, then the voters of the 40th would have a stronger political voice in the Senate than the voters of the 35th. If, on the other hand, the senators are elected county-at-large, then these variations in political strength among the voters within the county would be eliminated and precise equality would reign county-wide.

According to the 1960 Census, no two of Georgia's fifty-four senatorial districts have equal populations (R. 25; D. Ex. E; R. 33, 34). This results in there being fifty-four shades of permissible discrimination in voting strength among the districts. However, if the twenty-one senators assigned to the seven multi-district counties are elected county-at-large, then these shades of permissible discrimination are reduced to forty. All parties agree that the election of senators within their districts is not invidously discriminatory irrespective of the fifty-four permissible shades of discrimination. Therefore, why would not the challenged method of electing the Senate, which is less discriminatory, offend the Equal Protection Clause?

II.

No Invidious Discrimination Between Single and Multi-Member Districts.

As we have seen, the State Senatorial Reapportionment Act divided the State into fifty-four senatorial districts and, by virtue of requiring at-large elections in multi-district counties, into forty senatorial constituencies. In effect, the Bill divided the State into thirty-three single-member districts and seven multi-member districts. This districting results in the creation of **two** differences in treatment among the voters of the State in the election of

senators. **First,** voters in the more populous districts have the opportunity of electing plural senatorial representation, while the voters in any other district may only elect the single senator apportioned to them. **Second,** the voters of a district within a county having plural senatorial representation are not permitted to wholly elect a senator to represent only their district, but are required to join with the voters of the other districts within the county in electing the senators assigned to the county.

As to the first difference, it is clear that the combination of single and multi-member districts in structuring one or both chambers of a bicameral legislature is widely practiced. Maurice Klain, in his work entitled "A New Look at the Constituencies: The Need for a Recount and a Reappraisal,"[17] demonstrates the prevalence of multi-member representative districts among the State legislatures by stating that:

> Only nine states choose all legislators in single-member elections: California, Delaware, Kansas, Kentucky, Missouri, Nebraska, New York, Rhode Island, and Wisconsin. Formerly, such states were fewer; most of the time, nonexistent.[18]
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> Of 1,841 senate seats in 1954 only 221, a trifle over 12 per cent, are contested in multi-member ballotings. But these overall figures, lumping together 48 legislative bodies of different sizes, conceal the number, proportion, and identity of states which elect senators on a multi-member basis. There are 16 such states. . . . If Alaska enters statehood with its present legislative forms, it will end Arizona's distinction as the only

[17] 49 American Political Science Review 1105 (1955). Klain's findings were confirmed, and his data brought up to date, by Table 2 of David and Eisenberg, *State Legislative Redistricting: Major Issues in the Wake of Judicial Decision* (Chicago, Public Administration Service, 1962).

[18] Id., p. 1106, last par.

state electing all senators on a multi-member schedule. Hawaii chooses just one of 15 senators in a single-member election.[19]

A panoramic view of the 48 houses (of representatives), including Nebraska's single chamber, reveals that (representatives elected by multi-member districts) add up to more than 45 per cent of the seats—2,616 of 5,762—and are distributed among three-fourths of the states. The 12 states which elect no multiple-district representatives are the nine first named above, plus Arizona, Utah, and Vermont.[20]

Among the 36 states which contain them, the 2,616 (representatives elected by multi-member districts) amount to more than 58 per cent, outnumbering nearly three to two the 1,870 representatives elected in single-member districts.[21]

Hawaii and Alaska, like three of the states, name all representatives in multiple elections.[22]

In view of these statements and other data supplied by Klain, it is clear that the practice of combining both single and multi-member districts, or multi-member districts containing varying numbers of members, in structuring a legislative chamber, is and has been a widely prevalent practice among the States. Consequently, it is significant that none of the legislative apportionment cases decided by the Court have condemned the employment of multi-member districts in such fashions. Rather, the attention of this Court has been directed toward one basic question—whether the legislative apportionment under consideration reflects an irrational debasement of voting strength.

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[19] Id., p. 1107, 2d par.

[20] Id., p. 1108, last par.

[21] Id., p. 1109, 2d par.

[22] Id., p. 1111, 2d par.

Furthermore, federal courts have frequently approved apportionments of legislative chambers which were structured by the combination of single and multi-member districts. **Moss v. Burkhart** (D. C.—W. D. Okl.—1963), 220 F. Supp. 149, aff'd, sub nomine, **Williams v. Moss**, 378 U. S. 558; and **Daniel v. Davis** (D. C.—E. D. La.—1963), 220 F. Supp. 601. Compare: **Baker v. Carr** (D. C.—M. D. Tenn.—1963), 222 F. Supp. 684. The legitimacy of this structuring was recognized by this court in **Reynolds v. Sims**, supra, wherein it is stated that "One body could be composed of single-member districts while the other could have at least some multimember districts" (377 U. S. 577, 1st par., 12 L. ed. 2d 536, l. col., last par.).

Jones v. Freeman (1943), 193 Okl. 554, 146 P. 2d 564, concerned a mandamus action to test the validity of various legislative apportionment acts under the state constitution which required that the senate must be apportioned in such a manner as to avoid debasement in voting strength. The court in its opinion expressly approved the creation of single and multi-member senatorial districts by stating that: "Upon the question of whether the two additional Senators from Oklahoma County and the one additional Senator from Tulsa County must come from separate districts or may be elected from other districts or at large by the voters of the counties, the Constitution is not clear. Either method would be permissible, so long as substantial equality prevails." 146 P. 2d 573 (17).

In **Davis v. McCarty**,[23] the Oklahoma Supreme Court had under review State laws reapportioning the bicameral Oklahoma Legislature for the purpose of determining their compliance with State constitutional formulas. The State

[23] Okla. Supreme Ct.—388 P. 2d 480—decided Jan. 10, 1964. The Court granted no relief in this case because of the decision in *Moss v. Burkhart* (D. C.—W. D. Okl.—1963), 220 F. Supp. 149, aff'd, sub nomine, *Williams v. Moss*, 378 U. S. 558.

constitution required that the State be divided into forty-four senatorial districts, "each of which shall elect one senator; and the Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given such county in addition to the forty-four senators and the whole number to that extent."[24]

In construing this constitutional provision the Court held that "Where a county is apportioned two or more Senators because of the population factor, such senators may be elected by the voters at large in said county or from Senatorial districts therein where such districts are established according to law."[25]

In **Moss v. Burkhart,**[26] the district court reapportioned the Oklahoma legislature by judicial decree. The decree apportioned the senators among the various counties according to population and concluded with the proviso[27] that "until the Legislature, as apportioned hereunder, shall by appropriate legislation prescribe the boundaries of the Districts, within any one County of the State entitled to elect more than one Senator, under the provisions of this Order, the candidates for such senatorial offices shall be nominated and elected at large within such Counties." The degree apportioned the representatives in the same manner and again concluded with the proviso[28] that "until the Legislature, as apportioned hereunder, shall by appropriate legislation prescribe the boundaries

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[24] Okla. Const., Art. 5, Sec. 9 (a).

[25] Syllabus, 5th par., 388 P. 2d 481.

[26] (D. C., W. D. Okl., 1963), 220 F. Supp. 149, aff'd. sub nom. *Williams v. Moss*, 378 U. S. 558

[27] Id., p. 157, l. col., last par.

[28] Id., p. 160, l. col., 1st par.

of the Districts within any one County of the State entitled to elect more than one Representative, under the provisions of this Order, the candidates for such representative office shall be nominated and elected at large within such Counties."

Obviously, the decree did not place the reapportioned legislature under an affirmative duty to district the counties having plural representation. Therefore, the court in effect upheld the same method of electing representatives which is attacked in this case.

Furthermore, the **Baker v. Carr** district court decision rendered on October 10, 1963,[29] impliedly upholds the at-large election of senators in the counties assigned plural senatorial representation. The Senate committee justified this method of election in the following terms:[30]

> "The Tennessee Constitution forbids that any county shall be divided in forming a senatorial district. As a practical matter this means that every voter in Shelby County will be entitled to vote for and participate in the election of **five** senators; and the voter in Davidson County in the election of three senators. This provision assures to the voters in such counties the practical opportunity to exert greater political weight by the election of a slate or ticket backed by a political organization and both supported and publicized by a metropolitan press. The voter in a multi-county district has no such opportunity."

See also: **Preisler v. Doherty** (1955), 365 Mo. 460, 284 S. W. 2d 427 (11); **Graham v. Special Commissioners of Suffolk County** (1940), 306 Mass. 237, 27 N. E. 2d 995, 999, r. col., 1st par.; **Brophy v. Suffolk County Apportionment Com'rs** (1916), 225 Mass. 124, 113 N. E. 1040; and

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[29] (D. C.—M. D. Tenn.—1963), 222 F. Supp. 684.

[30] Id., p. 689, 1st col., last par.

Daniel v. Davis (D. C.—E. D. La.—1963), 220 F. Supp. 601, 602, r. col., last par.

In view of these authorities, it is clear that the combination of single and multi-member districts within a legislative chamber does not constitute invidious discrimination **unless** it results in an unjustifiable population disparity. **Therefore, it follows that if the Georgia legislature had not districted the seven most populous counties, but had merely apportioned the proper number of senators to each, then the structuring of the Senate would have unquestionably satisfied all constitutional standards.**

Turning to the second difference referred to above, this Court may judicially know that the City of Atlanta is divided into eight wards with two aldermen from each, who are elected city-at-large,[31] and that this electoral practice epitomizes a widely prevalent method of electing municipal and county legislative bodies throughout the nation.[32] Obviously, this method of electing representatives does not constitute invidious discrimination unless it produces population disparities in voting strength.

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[31] Ga. Laws, 1952, pp. 2635-2637, Secs. 1, 3 and 4.

[32] *The Municipal Yearbook* (1964), at p. 89, ftn. 2, states that:

"The 55 cities which elect at-large councilmen nominated by wards are: Ozark, Alabama; Tucson, Arizona; El Dorado, Arkansas; Alhambra, Compton, Long Beach, Newport Beach, Oakland, San Leandro, Santa Ana, and Stockton, California; Greeley, Colorado; Wilmington, Delaware; Belle Glade, Bradenton, St. Petersburg, and Tampa, Florida; LaFayette, Georgia; Portland, Maine; Chelsea, Massachusetts; Cadillac, Holland, Iskester, Jackson, and Lansing, Michigan; Columbia, Mississippi; Kansas City and Springfield, Missouri; Concord, New Hampshire; Raritan, New Jersey; Jamestown and Niagara Falls, New York; Jacksonville, Mooresville, New Bern, and Rocky Mount, North Carolina; Maple Heights, Ohio; Elk City, Enid, Guymon, Midwest City, Okmulgee, and Pawhuska, Oklahoma; Springfield, Oregon; Abbeville, Charleston, and Greer, South Carolina; Columbia, Tennessee; Ennis, Hillsboro, Mesquite, Nederland, Pampa, and Port Arthur, Texas; Ogden, Utah."

Nevertheless, the appellees contend that the county-at-large election of senators results in invidious discrimination against the voters in any senatorial district in Georgia which is comprised of less than an entire county because in any such district the representative chosen by the voters may be defeated by the votes of persons not residing in that district.

This contention is untenable. Upholding it would invalidate the method of electing a vast number of aldermen in cities across the Nation, not on the basis of ward population disparities, but simply because their charters require that the candidates from the various wards run city-at-large.

One of the reasons frequently attributed for Atlanta's progressive and moderate government is the fact that its aldermen are elected at-large with the result that they are permitted to consider measures in the light of the interests of the City as a whole, instead of being limited by parochial viewpoints engendered by ward election. If such a method of electing aldermen is beneficial for the City of Atlanta, then why would not the same method of electing senators be beneficial for Fulton County?

If the contention of the appellees is sound, then it would not only invalidate a technique of apportionment frequently built into state, county and municipal legislatures, but would also deprive the courts of one of their most effective remedies in eradicating legislative malapportionments. For example, suppose the legislature had required that Fulton's senators run only within their districts and had then drawn these district lines in such a manner as to create egregious population disparities among the districts. In eliminating this malapportionment, would it not be much better for the court to order a county-at-large election for the senators, rather than to undertake the making of the classic legislative judgments

involved in drawing district lines? Obviously, such lines could not be drawn without affecting partisan interests.

Under the State Senatorial Reapportionment Act, the seven most populous counties are divided into districts of substantially equal population. The sole purpose of this districting is to insure a dispersion of representation throughout each county. The legislature could have allotted the senators to each county without districting it, but this would have permitted the election of all the senators from the same part of the county.

In our consideration of these two differences (single and multi-member districts and county-at-large elections) we have found that both are equally inoffensive to constitutional standards. Consequently, why does the joining of these two differences in structuring the Georgia Senate produce invidious discrimination?

III.

The Contours of Equal Protection.

In **Baker v. Carr**, supra, the plaintiffs contended that the structure of the Tennessee legislature effected a gross disproportion of representation to voting population, and thereby placed them in a position of constitutionally unjustifiable inequality. The majority opinion of this Court concluded that the "right asserted is within the reach of judicial protection under the Fourteenth Amendment."[33]

The concurring opinion of Justice Douglas in **Baker** undoubtedly reflected the thinking of the majority in defining the scope of the Equal Protection Clause in the following terms:[34]

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[33] 369 U. S. 237, 2d par., 7 L. ed. 2d 607, 1. col., last par.

[34] 369 U. S. 244, 4th par., 7 L. ed. 2d 701, 1. col., 4th par.

There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?

The traditional test under the Equal Protection Clause has been whether a State has made "an invidious discrimination," as it does when it selects "a particular race or nationality for oppressive treatment." See **Skinner v. Oklahoma**, 316 U. S. 535, 541, 86 L. ed. 1655, 1660, 62 S. Ct. 1110. Universal equality is not the test; there is room for weighting. As we stated in **Williamson v. Lee Optical of Okla., Inc.**, 348 U. S. 483, 489, 99 L. ed. 563, 573, 75 S. Ct. 461. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

And Justice Stewart in his concurring opinion stated that:[35]

In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term—that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." **McGowan v. Maryland**, 366 U. S. 420, 425, 6 L. ed. 2d 393, 399, 81 S. Ct. 1101. In case after case arising under that Clause we have also said that "the burden of establishing the unconstitutionality of a statute rests on him who assails it." **Metropolitan Casualty Ins. Co. v. Brownell**, 294 U. S. 580, 584, 79 L. ed. 1070, 1072, 55 S. Ct. 538. Today's decision does not turn its back on these settled precedents.

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[35] 369 U. S. 200, 1st par., 7 L. ed. 2d 714, 1 col., 2d par.

In **Reynolds v. Sims**, supra, the Court reiterated this rational by stating that:[36]

> We indicated in **Baker**, however, that the Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a state legislative apportionment scheme, and we stated:
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> "Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects **no** policy, but simply arbitrary and capricious action."

These opinions clearly illustrate that this Court intends that the traditional tests under the Equal Protection Clause are the ones to be applied in determining the validity of state legislative apportionments. Obviously, this Court did not attempt to create any new judicial standards for courts to apply when faced with a claim of arbitrary state action in the field of legislative apportionment.

In **Norvell v. Illinois**,[37] this Court had before it a case in which the petitioner was convicted of murder in a state court at a trial in 1941, in which he, though indigent, was represented by a lawyer. He was unable to obtain a transcript and did not pursue an appeal from his conviction. In 1956, the petitioner made a motion in which the trial court was requested to furnish a steno-

[36] 377 U. S. 557, 12 L. ed. 2d 524, r. col., 2d par.
[37] (1963), 373 U. S. 420, 10 L. ed. 2d 456, 83 S. Ct. 1366, reh. den., 373 U. S. 870, 11 L. ed. 2d 99, 84 S. Ct. 27.

graphic transcript of his trial. However, no such transcript was available due to the death of the court reporter. The state courts denied the petitioner a new trial and he filed his application for certiorari with this Court. Upon appeal, he relied upon **Griffin v. Illinois,**[38] holding on the facts of that case that it was a violation of the Fourteenth Amendment to deprive a person because of his indigency of any rights of appeal afforded all other convicted defendants.

This Court granted the application for certiorari and in an opinion by Justice Douglas, expressing the views of six members of the Court, held that under the circumstances the denial of post-conviction relief to the petitioner did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. This Court expressed its views on the scope of the Equal Protection Clause in the following terms:[39]

> As we said in **Tigner v. Texas,** 310 U. S. 141, 147, 84 L. ed. 1124, 1128, 60 S. Ct. 879, 130 A. L. R. 1321:
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> "... The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."
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> When, through no fault of the State, transcripts of criminal trials are no longer available because of the death of the court reporter, some practical

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[38] 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585, 55 A. L. R. 2d 1055.

[39] 373 U. S. 423, last par., 10 L. ed. 2d 459, n. col., 1st par.

accommodation must be made. We repeat what was said in **Metropolis Theatre Co. v. Chicago**, 228 U. S. 61, 69, 70, 57 L. ed. 730, 734, 33 S. Ct. 441.

> "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. . . . What is best is not always discernible; the wisdom of the choice may be disputed or condemned."

The "rough accommodations" made by government do not violate the Equal Protection Clause of the Fourteenth Amendment unless the lines drawn are "hostile or invidious". **Welch v. Henry**, 305 U. S. 134, 144, 83 L. ed. 87, 92, 59 S. Ct. 121, 118 A. L. R. 1142. We can make no such condemnation here.

In **Lindsley v. Natural Carbonic Gas Company**,[40] Mr. Justice Van Devanter speaking for a unanimous Court, held that:[41]

> The rules by which this contention (violation of equal protection) must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify * * * but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in

[40] (1911), 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337.

[41] 220 U. S. 78, last par., 55 L. ed. 377, r. col., 3d par., 31 S. Ct. 340.

such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. **Bachtel v. Wilson,** 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 S. Ct. 243; **Louisville & N. R. Co. v. Melton,** 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676; **Ozan Lumber Co. v. Union County Nat. Bank.,** 207 U. S. 251, 256, 52 L. ed. 195, 197, 28 S. Ct. 89; **Munn v. Illinois,** 94 U. S. 113, 132, 24 L. ed. 77, 86; **Henderson Bridge Co. v. Henderson,** 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 S. Ct. 553.

In **McGowan v. Maryland,** 366 U. S. 420, 425-426, 81 S. Ct. 1101, 1104-1105, 6 L. ed. 2d 393, 398, r. col., last par., in referring to the question as to whether under the circumstances of that case charging that certain provisions of the state statute were arbitrary and capricious, this Court said:

> The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. **A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.** (Emphasis added.)

In 1931 the late Mr. Justice Homes, speaking for this Court in **Bain Peanut Co. v. Pinson**, 282 U. S. 499, 501, 51 S. Ct. 228, 229, 75 L. ed. 482, said: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." See also: **Morey v. Doud**, 354 U. S. 457, 463-466, 77 S. Ct. 1344, 1 L. ed. 2d 1485 (1957).

In view of these authorities, it is clear that the State is to be allowed every reasonable latitude in the field of legislative apportionment, and any device therein will not be set aside if any state of facts reasonably may be conceived to justify it.

IV.

The Rationality of County-at-Large Elections.

Historically, the counties of Georgia are the basic units of representation and local government.[42] Georgia, since earliest times, has consistently emphasized county government and the county unitary approach. A county is a political subdivision of the State, created for administrative purposes, is representative of the sovereignity of the State and auxiliary to it. Its functions are of a public nature; it is political in character, and constitutes the machinery by and through which many of the powers of the State are exercised.[43] Consequently, the operation of county government over a period of years produces a degree of solidarity from economic, social and political causes. In other words, a county generally reflects a fairly solid unit of political thinking.

In **Reynolds v. Sims**, supra, this Court approved the practice of drawing state legislative districts according to county boundaries in the following terms:

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[42] See *Sanders v. Gray* (D. C.—N. D. Ga.—1962), 203 F. Supp 158, at pp. 161-163.

[43] Compare: 6 EGL. Counties, Sec. 2, p. 522.

Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting . . . (377 U. S. 578, 1st par., 12 L. ed. 2d, r. col., last par.)

A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or flotorial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State. (377 U. S. 578, 2d par., 12 L. ed. 2d 537, 1. col., last par.)

In **Lucas v. The Forty-Fourth General Assembly of the State of Colorado** (1964), 377 U. S. 713, 12 L. ed. 2d 632,

the Court considered the constitutional significance of a majority of the voters: rejecting proposed Amendment No. 8 to the Colorado Constitution, which prescribed an apportionment plan pursuant to which seats in both houses of the Colorado Legislature would be apportioned on a population basis; and adopting proposed Amendment No. 7 which, on the other hand, prescribed apportionment for the lower house on the basis of population and the senate on the basis of population and various other factors. The appellees argued that this rejection by the electorate indicated a clear choice between competing methods of apportionment. This Court responded to this contention by stating that:

> However, the choice presented to the Colorado electorate, in voting on these two proposed constitutional amendments, was hardly as clear-cut as the court below regarded it. One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies **within** the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multi-member county represented the county as a whole. Amendment No. 8, as distinguished from Amendment No. 7, while purportedly basing the apportionment of seats in both houses on a population basis, would have perpetuated, for all practical purposes, this debatable feature of

the existing scheme. Under Amendment No. 8, senators were to be elected at large in those counties given more than one Senate seat, and no provision was made for subdistricting within such counties for the purpose of electing senators. Representatives were also to be elected at large in multimember counties pursuant to the provisions of Amendment No. 8, at least initially, although subdistricting for the purpose of electing House members was permitted if the voters of a multimember county specifically approved a representative subdistricting plan for that county. Thus, neither of the proposed plans was, in all probability, wholly acceptable to the voters in the populous counties, and the assumption of the court below that the Colorado voters made a definitive choice between two contrasting alternatives and indicated that "minority process in the Senate is what they want" does not appear to be factually justifiable. (377 U. S. 731, 12 L. Ed. 2d 644, l. col., last par.)

However, the Court was careful to point out in **Lucas** that: "We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multi-member counties" (377 U. S. 731, ftn. 21, 12 L. ed. 2d 644, ftn. 21).

In view of these considerations it is a rational and intelligible objective for the State to seek to preserve the political integrity of counties in the representation of interests in the General Assembly. The same advantages experienced by a multi-ward city whose aldermen run city-at-large, are also experienced by a multi-district county whose senators run county-at-large. These ad-

vantages to the city are well described in the following excerpt:[44]

> The election of councilmen by wards under normal conditions has certain obvious advantages. First, it gives the voter in the council election a short and simple ballot. Second, it gives him the opportunity of selecting someone living near him about whom it should be possible to get personal information. Third, insofar as the wards have peculiar and special interests, it provides means for their representation in the council.
>
> The people in the United States have in recent years been inclined to give more weight to the arguments against the ward system than to those in its favor. Residence within the ward has come to be almost everywhere a prerequisite to election from the ward.
>
> Considering the manner in which people in cities draw themselves apart from each other for residence purposes, it is not surprising that some wards are left without adequate aldermanic material. Even the labor leaders may chance to be grouped all in one ward, and some of them may be in wards where they have no chance of election. The result is often a narrow restriction of the range of choice and in some wards the election to the council of men not up to the general standard. Furthermore, the basis upon which selection is made within the ward tends to be that of service to the ward instead of ability to serve the city. A ward alderman is expected to get something for his ward—some street improvement or a public building or at least work and help for needy constituents. If he must indulge in logrolling to get

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[44] *American City Government* (1950—Revised Ed.), by Anderson and Weidner, pp. 404-406. See also *Governing Urban America* (1955), by Charles R. Adrian, p. 233.

results, his action will be condoned by his constituents, whereas to come home with "clean but empty hands" is considered a proof of weakness in aldermen as well as in ambassadors. It scarcely needs to be said that many of the men who engage in such a scramble for spoils and ward improvements are a distinctive type whose presence in the council in large numbers is almost certain to give it a low moral tone.

The ward system gives very unequal results in the matter of representation. If the city be gerrymandered —and it is likely to be—then one of the parties is reasonably sure to be under-represented or at least to feel that it is. Even where the original ward lines are made carefully and honestly, the rapid shifting and growth of population in cities soon upsets the entire division of representation. Once established, however, and even when there was little reason for them in the first instance, ward lines tend to become fixed, almost unchangeable. It is not uncommon, therefore, to find cases of minority rule continued for years and even decades.

Other defects can easily be found. Ward lines are not, as a rule, the natural boundaries of distinct geographical areas or social groups but rather artificial or merely traditional limits. The aldermen elected from wards are never responsible to the city as a whole. Certain groups that have respectable numbers of voters but not enough to carry any ward may find themselves wholly unrepresented or very poorly represented by some fusion candidate. Indeed under the ordinary system of voting, even if the wards are all practically equal in population, the ward system of election may result in anything from absolute dominance of the council by a plurality party to a fair apportionment of representation among all groups and parties. To control the council a party needs only to

carry a majority of the wards, and this it may do by a bare majority of plurality in each ward as the case may be.

Let us suppose a simple case of five wards, substantially equal, and only two parties, one of which is, however, handicapped by having a concentration of its voting power in one ward, which is not an uncommon case (see Table 24). The illustration here given may be considered an extreme case, but such cases are not entirely imaginary.

Table 24: A sample election by wards.

	Ward 1	Ward 2	Ward 3	Ward 4	Ward 5
Party A vote	6,200	6,300	6,500	6,400	3,000
Party B vote	5,800	5,700	5,500	5,600	9,000
Aldermen elected	A	A	A	A	B

Total vote, both parties, 60,000 ..... 100%

Total A vote, 28,400 ..... 47½%

Total B vote, 31,600 ..... 52½%

A members in council, number 4, or 80 percent of total.

B members in council number 1, or 20 percent of total.

7,100 votes elected each A member; 31,600 votes succeed in electing only one B member.

The assumption behind the ward system of representation is that men are best represented on the basis of the geographical areas in which they live. Such an assumption is less true today than it ever was. In a mobile and diversified population, men divide in a variety of ways—on the basis of their occupation, the level of their incomes, their religion, their racial and ethnic characteristics, their philosophies, their parties. A geographical factor may be added to this list, but it is only one of many items of importance, and it does not wholly conform to any of the others. If councilmen are elected at large, especially if by proportional representation, groups of voters do not have to rely upon geographical concentration of strength in order to assure themselves of representation.

> Election at large—By the election of councilmen at-large a city gains certain obvious advantages. Ward boundaries are for all practical purposes wiped out. Gerrymandering becomes impossible. The parties or other groups may put forward their best men, no matter where they live in the city. Being elected from and responsible to the city as a whole, the councilmen must put more stress upon general city-wide problems both in the campaign and in office than upon the special needs of little districts. Furthermore, when elected at large the council practically must be a small body. There is reason to believe, therefore, that somewhat abler men will be chosen.

By an Act approved September 24, 1959 (Pub. Law 86-380, 73 Stat. at L. 703), the Congress established an Advisory Commission on Intergovernmental Relations and assigned it the duties, *inter alia*, of encouraging discussion and study at an early stage of emerging public problems that are likely to require intergovernmental cooperation and of recommending, within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government.

On December 13, 1962, the Commission issued its Report entitled "Apportionment of State Legislatures",[45] which included the recommendation, *inter alia*, that " 'Equal protection of the laws' would seem to presume, and considerations of political equity demand, that the apportionment of both houses in the State legislature, be based strictly on population."[46] Although the Commission is population oriented in apportionment matters, it

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[45] U. S. Government Printing Office, Washington 25, D. C.

[46] Id., p. 67, 2d par.

nevertheless recognizes the value of preserving the territorial integrity of a county in districting. For instance, the Commission included within its conclusions and recommendations the following statement:[47]

> Only one procedure has been developed that can eliminate the problem of drawing district lines. This procedure would base representation permanently on political subdivisions or on geographic areas which may or may not take population into consideration. Population may be a factor by permitting those units with larger populations to elect more than one legislator but by requiring all such legislators to be elected at large. Thus, the need to draw district lines after each apportionment is eliminated.

Furthermore, federal courts have frequently approved districting plans which utilized county lines. **Moss v. Burkhart** (D. C.—W. D. Okl.—1963), 220 F. Supp. 149, aff'd, sub nomine, **Williams v. Moss**, 378 U. S. 558; **Daniel v. Davis** (D. C.—E. D. La.—1963), 220 F. Supp. 601. Compare: **Baker v. Carr** (D. C.—M. D. Tenn.—1963), 222 F. Supp. 684.

These considerations clearly demonstrate that requiring at-large elections in multi-district counties is a rational and reasonable legislative objective which is not precluded by the Equal Protection Clause. Furthermore, the rationality of individual county representation is particularly apparent in Georgia where legislative action applicable only to one or more particular counties is traditional. The question before the Court is not whether the requirement of county-at-large elections is wise or unwise,[48] but simply whether it is invidiously discrimi-

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[47] Id., p. 61, 1st par.

[48] It is well established that courts are not concerned with the wisdom of legislation, but only with the power of the legislature

natory. Manifestly, the requirement reflects a rational policy fully consistent with the principles of the Equal Protection Clause. The Court should be loath to discard an operative system of government on the basis of the vague and untenable contentions of invidious discrimination advocated by the Appellees.

V.

The Solemnity of the Challenged Enactment.

Soon after the enactment of the State Senatorial Reapportionment Act on October 5, 1962, doubt arose as to whether the Georgia Constitution permitted the Senators from the multi-district counties to be elected county-at-large.[49] In order to eliminate any question as to the validity of such at-large elections, the General Assembly adopted a Resolution[50] proposing an Amendment to the Constitution whose chief significance was to expressly authorize and ratify this method of election. The proposal was submitted to the people at the 1962 General Election as a separate and distinct measure which was voted upon individually. If the people had rejected such proposal, then the apportionment of the Senate according to popula-

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to enact it. *Ferguson v. Skrupa* (1963), 372 U. S. 726, 729, 1st par., 10 L. ed. 2d 93, 96, 1. col., last par., 83 S. Ct. 1028, 95 A. L. R. 2d 1347; *Flemming v. Nestor* (1960), 363 U. S. 603, 611, last par., 4 L. ed. 2d 1435, 1444, r. col., last par., 80 S. Ct. 1367; *Railroad Retirement Board v. Alton Railroad Company* (1935), 295 U. S. 330, 346, 2d par., 79 L. ed. 1468, 1474, r. col., 1st par.; *Norman v. Baltimore & Ohio Railroad Company* (1935), 294 U. S. 240, 307, last par., 79 L. ed. 885, 897, 1. col., 1st par.; and *Powell v. Pennsylvania* (1888), 127 U. S. 678, 686, 1st par., 32 L. ed. 253, 257, 1. col., 1st par., 8 S. Ct. 992.

[49] See *Finch v. Gray* (Fulton Superior Ct.—No. A 06441), and in particular, the Orders of October 29 and 30, 1962.

[50] Ga. Laws, Sept.-Oct., 1962, Extra. Sess., pp. 51-52.

tion would not have been affected, except to the extent that the Georgia courts might finally have determined under the State Constitution that the Senators from the multi-district counties would have to be elected within their respective districts. Obviously, no catastrophe would have befallen the people had they rejected the proposed Amendment. Nevertheless, the people ratified the Amendment by a vote of 119,502 for and 75,598 against. The Amendment carried in each of the multi-district counties except Bibb.

Ratification of a constitutional provision by the people is the most solemn form of political enactment.

The preference of the people of Georgia for the Senators from the multi-district counties to be elected county-at-large, as expressed by constitutional ratification, negates the presence of invidious discrimination. Compare: **Davis v. Synhorst** (D. C.—S. D. Iowa—1963), 217 F. Supp. 492, at p. 498, r. col., 1st par.; and **Toombs v. Fortson** (D. C.—N. D. Ga.—1962), 205 F. Supp. 248, at p. 256, l. col., 2d par.

VI.

Rigidity in Legislative Apportionment Should Be Avoided.

American democratic government is still in the process of evolution, the latest seismic developments of which have been **Baker v. Carr** and **Reynolds v. Sims**. The state legislatures have frequently been recognized in their role as "testing laboratories" of the governmental process, whereby innovation and experiment may be undertaken and later retained or rejected as the results dictate. Obviously, there is still much to be learned and many improvements possible in the application of the

theory of representative government. Political scientists are presently studying systems of proportional representation,[51] cumulative voting,[52] limited voting,[53] and weighted voting.[54]

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[51] A system of elections for legislative bodies in which an attempt is made to secure the representation of all parties or points of view in approximately the same proportions as their supporters exist in the district. Provision is made for several representatives per district, and for securing representation for minorities. The *Model State Constitution*, drafted in 1948 by the Committee on State Government of the National Municipal League, called for a single legislative chamber elected by proportional representation from districts of compact and contiguous territory, "from each of which there shall be elected from three to seven members, in accordance with the population of the respective districts." See also *Johnson v. City of New York* (1937), 274 N. Y. 411, 9 N. E. 2d 30; Phillip, *State and Local Government in America* (1954), p. 145, 3d par., p. 422, 4th par.; Brinkley and Moos, *A Grammar of American Politics* (2d ed.—1952), p. 964, last par.; and Clarence Gilbert Hoag and George Hallett, Jr., "Proportional Representation," New York, The Macmillan Company (1926).

[52] A system of representation in which the voter elects several members of a legislative body. He is given as many votes as there are seats to be filled, and can distribute his votes as he pleases, giving them all to one candidate if he so desires. See Phillip, *State and Local Government in America* (1954), p. 144, last par., p. 422, 3d par.; and George S. Blair, "Cumulative Voting," Urbana, University of Illinois Press (1960).

[53] A system wherein a voter may not vote for the full number of legislative seats to be filled in a district, thereby assuring in most cases that the minority party will elect some representatives. Phillip, *State and Local Government in America* (1954), p. 145, 2d par., p. 422, 2d par.

[54] A system in which a representative's vote is weighted according to the population of his district, number of actual votes cast for him, or other standard selected for weighting. See: Report, "Apportionment of State Legislatures," *Advisory Commission on Intergovernmental Relations* (Dec. 1962), p. 31, last par.; Gordon E. Baker, *State Constitutions: Reapportionment* (National Municipal League) (1960), pp. 33-34; Robert H. Engle, "Weighting Legislators' Votes to Equalize Representation," Western Political Quarterly, 12:442 (1959); Gus Tyler, "What is Representative Government," *The New Republic* (July 16, 1962), p. 18. In *Thigpen v. Meyers* (D. C.—W. D. Wash.—1964), 231 F. Supp. 938, ordered into effect a system of weighted voting in the Washington State Legislature when it failed to reapportion itself in time.

These considerations coupled with the lessons of history demonstrate that the institutions of representative government will continue to be confronted with changing conditions, circumstances and problems. This fact of history argues strongly for the enunciation of fundamental governing standards in terms sufficiently broad to assure that the essence of any given standard will be preserved when applied in a climate of circumstances not anticipated at the moment of authorship. Consequently, absolute rigidity should be avoided in order to permit the free development of fairer and more equitable voting systems and legislative apportionments. Yet, the Appellees in this case attempt to invoke a rigid interpretation of the Equal Protection Clause by attacking the requirement of at-large elections for senators from the multi-district counties, while conceding that such counties have been apportioned their fair share of senators according to population. This contention has no more merit than one seeking to force a state to adopt a system of proportional representation, cumulative voting or limited voting, in order to afford an opportunity for a minority party to elect its own representative. Obviously, such contentions are unsound today, and if adopted, could not withstand the test of time.

Even a cursory look across the Nation, reveals a vast variety of technique in the apportioning and districting of state, county and municipal legislative bodies. The increased emphasis and study now being given these matters promises a rapid proliferation of new techniques in this area. In the face of these present circumstances and impending changes, the courts cannot afford to shackle this development and experimentation with such rigidity as is advocated by the Appellees, but rather the courts should rely on broad formulas designed solely to secure substantial equality of voting strength within a rational framework of legislative apportionment.

A further example of this variety is found in **Blaikie v. Powers.**[55] The court held therein that the New York City charter provision establishing limited voting by which each voter can vote for only one of the two candidates for office of councilman at-large from his borough, which is entitled to two councilmen at-large, does not violate the Equal Protection Clause. A dissenting opinion was filed in this case which relied in part on the "one man-one vote" formula stated in **Gray v. Sanders**, supra.

On appeal to this Court, the plaintiffs presented the following question:

> Does New York City Charter provision violate Fourteenth Amendment's Due Process and Equal Protection Clauses by disenfranchising electorate and diluting, restricting, and limiting their votes by denying them right to cast their ballots and have their votes counted for all elective offices, and by denying political organizations and their members right to nominate and elect candidates to fill all public offices (32 L. W. 3229).

Nevertheless, on January 13, 1964, this Court in a *per curiam* opinion granted the motion to dismiss for want of a substantial federal question. No. 617, 1963 Term, 11 L. ed. 2d 471.

The Appellant believes that there is no invidious discrimination in this case because there is no dilution of voting strength. Each voter in Georgia has a substantially equal voice in the election of State senators irrespective of the fact that there is a variation in the structure of constituencies because of the employment of single and multi-member districts. Consequently, this case presents nothing more than a political debate which addresses itself to the legislature and to the people of Georgia.

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[55] (1963), 13 N. Y. 2d 134, 243 N. Y. S. 2d 185, 193 N. E. 2d 55.

CONCLUSION.

For the foregoing reasons, the judgment of the Court below should be reversed.

Respectfully submitted,

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November 10, 1964.

IN THE

Supreme Court of the United States

October Term, 1964

Number 178

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,

Appellant,

vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,

Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF FOR THE APPELLEES

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION BELOW

The Appellant has correctly cited the opinion below and Appellees will not re-cite that opinion.

JURISDICTION

The Appellant's statement of jurisdiction, including the citations of statutory and case law, is correct and Appellees adopt Appellant's statement of jurisdiction.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Appellant has correctly stated and cited the statutory and constitutional provisions involved in the case before the Court and Appellees will therefore make no restatement of the statutory and constitutional provisions involved.

QUESTIONS PRESENTED

Appellant has correctly stated the questions presented for decision by this Court and Appellees adopt Appellant's statement.

STATEMENT OF CASE

This is a direct appeal from the final judgment and decree entered on April 6, 1964 by a three judge panel convened in the United States District Court for the Northern Judicial District of Georgia to hear this case pursuant to 28 USC §2281. The Court below granted Appellees' Motion for Summary Judgment and declared that portion of Section 9 of the Senate Reapportionment Act of the General Assembly of the State of Georgia, approved on October 5, 1962,[1] which reads "except that the Senators from those Senatorial Districts consisting of less than one county shall be elected

[1] Georgia Laws, September-October, 1962, Extra. Sess. Page 7, at Page 30; Georgia Code Annotated, §47-102.

by all of the voters of the county in which such Senatorial District is located" to be unconstitutional, null and void because it violates the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States.

The effect of that decree was to find that every senator elected to the State Senate of the State of Georgia must be elected by the voters of his own district, without regard to whether said senator represents a senatorial district comprising an entire county or more than one county or less than one county.

The original complaint was filed in the United States District Court by three registered voters, two of whom resided in the 40th Senatorial District, which is a part of Fulton County, Georgia, and one of whom resided in the 42nd Senatorial District, which is a part of DeKalb County, Georgia. One of the plaintiffs was also the elected State Senator from the 40th Senatorial District of the State of Georgia. The complaint named as defendants the Secretary of State of Georgia and the Ordinaries of Fulton and DeKalb Counties, who are the chief election officials of their respective counties. The complaint alleged that the seven most populous counties of the State of Georgia contained more than one senatorial district and the remainder of Georgia's 159 counties either made up a single senatorial district or several counties taken together comprised a single senatorial district. The Appellees sought to invalidate that part of the statute which is above quoted that required that State Senators from those senatorial districts consisting of less than one county had to be elected by all of the voters of the county in which such senatorial district was located.

Appellant admitted all of Appellees' allegations of fact in the Court below and the case was submitted to the District Court solely on a question of law raised by the Motion for Summary Judgment of Appellant and Cross-Motion for Summary Judgment of Appellees.

ARGUMENT

While the case law involved in issue before the Court is relatively new, far reaching in scope, and well known to this Court, a brief review of the precedents will serve to establish the foundation of the Appellees' position.

Baker v. Carr, 369 US 186, was an action filed in the United States District Court in Tennessee under 42 USC §§1983 and 1988, by qualified voters seeking to redress deprivation of their rights under the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States. The plaintiffs in that action specifically attacked a statute of the State of Tennessee on the grounds that it arbitrarily and capriciously apportioned seats in the Tennessee General Assembly and by virtue of a failure on the part of the Tennessee State Legislature to reapportion itself, the plaintiffs' votes were debased and they were thereby denied equal protection of the laws.

The action now before the Court is similar in that it is an action in a United States District Court, also filed under 42 USC §§1983 and 1988, by qualified voters of the State of Georgia who seek to redress rights deprived them by a statute of the State of Georgia denying them equal protection of the laws within the meaning of the Fourteenth Amendment by diluting or debasing their voting power. *Baker v. Carr*, supra, laid to rest the

questions of jurisdiction of the subject matter, standing to maintain such a suit, and the justiciability of the cause of action.

The rationale of the District Court decision was that "the essence of a representative government is the choosing of a representative by those he represents." This same reasoning underlies the same District Court's decision in *Toombs v. Fortson*, (D.C. Ga. 1962) 205 F. Supp. 248. Appellees respectfully submit that this rationale is plainly correct and it therefore follows that any system of electing one's representatives other than by those he represents lacks "the essence of representation" heretofore twice noted by the District Court below and demanded by the decisions of this Court.

In the case before this Court, the undisputed facts are that there are seven senatorial districts within Fulton County, Georgia. They are:

District 34 containing 82,195 voters
District 35 containing 82,888 voters
District 36 containing 79,023 voters
District 37 containing 78,540 voters
District 38 containing 78,953 voters
District 39 containing 79,713 voters
District 40 containing 74,834 voters

Three senatorial districts lie within DeKalb County, Georgia. They are:

District 41 containing 75,117 voters
District 42 containing 95,032 voters
District 43 containing 86,633 voters

From a mathematical standpoint, it is clear that even if every voter in Senatorial District 34 voted for the same candidate to represent that District, only eighteen (18%) percent of the voters in the other six districts

within Fulton County could nullify the unanimous choice of District 34 voters and thrust upon them a representative for that district for whom no one at all within that district had voted. This is an extreme example; however, it is far more likely that the most popular candidate imaginable in District 34 would receive the votes of 60% to 66% of the voters of the district. In this situation, only 11% of the voters of the other six Fulton County Districts could nullify the representative chosen by the vast majority of the voters in District 34. Such a result amounts to invidious discrimination against the voters in any senatorial district of the State of Georgia which is comprised of less than an entire county, because in any such district the representative chosen by the voters of that district may be defeated by the voters of foreign districts. In *Drew and Sideman v. Scranton* and *Johnson v. Bloom*, (M. D. Pa. 1964) 229 F. Supp. 310, the Federal District Court in Pennsylvania held that the use of multi member districts along with single member districts violate the principle of "one man—one vote." "One man—one vote" means, the Court said, that each voter must vote for the same number of legislators, otherwise some voters would have only one legislator looking out for their interests; others would have two, three or four although, of course, their districts might be two, three or four times larger. The Court added that "minority groups living in particular localities may well be submerged in elections at large but can often make their voting power much more effective in smaller single member districts in which they may live." This same rationale could work to deny proportionate representation or any representation at all to a minority political party which also might well be submerged in elections at large but could

use its voting power effectively in smaller single member districts. The fundamental issue in either the case of minority groups or minority political parties should be to achieve at least some representation of the minority's viewpoint in the legislative body of the State.

In *Wesberry v. Sanders*, 376 US 1, this Court said:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

The Court was following its previous thinking in *Gray v. Sanders*, 372 US 368, where Justice Douglas said at page 379:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, wherever their home may be in the geographical unit. This is required by the equal protection clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters, but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates underlies many of our decisions."

Is not the purpose of county wide voting in the urban areas to dilute the strength and representation of minority, racial, religious, ethnic and political groups, im-

pacted within a small geographical area of the county? We submit that this is the purpose. Is this not another invidious scheme to obtain the end result exemplified by the term "gerrymandering"? The effect here is far worse on a minority group than a simple scheme of gerrymander.

The majority of the voters in the Georgia Senatorial Districts where the district is comprised of an entire county or more than one county get an entire vote for their representative and, therefore, directly participate in his election. The majority of the voters within a given district in multi district counties are not able to elect their popular choice to represent them. The voters in multi district Georgia counties are denied equal protection of the laws by virtue of the fact that their vote for their popular choice can be frustrated by a small percentage of voters who vote from foreign districts within the same county.

The Georgia statute which has been declared unconstitutional by the Court below, causes a clear difference in the treatment to be accorded to voters in each of the two classes of senatorial districts created by the statute. The statute is applied differently to different persons, depending upon where they reside. The voters in one class of districts select their own senators, but in the other they do not. They must join with others in selecting a group of representatives and their own choice of representation may be nullified by what voters in other districts of the county group desire. This difference amounts to a discrimination between the two classes of voters and this discrimination is such that is prohibited by the Fourteenth Amendment. In *Gray v. Sanders*, this Court held that under the Equal Protection clause of

the Fourteenth Amendment there is no indication that home site "afforded a permissible basis for distinguishing between qualified voters within the State."

The Georgia General Assembly has historically used geography to discriminate against urban voters. Previously the county unit system deprived the urban voter of any power in the elections and in the legislature. Reapportionment, under Court order, has eliminated this. In reapportioning the Senate, the old General Assembly again sought to minimize the strength of certain urban groups. Certain districts were predominantly composed of racial and political minorities. The only way to prevent the election of members of these groups to the Senate was to require something other than district elections in the urban areas. This gave birth to the county wide election method in the multi district counties and the representation of the county as a unit rather than the district.

Thus, Georgia has by statute created two classes of voters—one with representation and one without.

CONCLUSION

Appellees respectfully submit that they have demonstrated that the portion of the State statute attacked which requires county wide elections in multi district counties violates the equal protection clause of the Fourteenth Amendment. Appellant, on the other hand, has shown no valid reason why county wide voting is required under the statute and no valid reason why different categories of voters receive different treatment with regard to their vote for their State Senator. For

the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles A. Moye, Jr., one of the attorneys for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of November, 1964, I served a copy of the foregoing Brief for the Appellees on the Appellant by mailing a copy in a duly addressed envelope with postage prepaid to his Counsel of Record, The Honorable Eugene Cook, Attorney General of the State of Georgia, 132 Judicial Building, 40 Capitol Square, Atlanta, Georgia.

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